IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELILA J. HALL AND TERRY L. HALL,	)	
PLAINTIFFS	)	
VS.	)	CASE NO.: 95-C-310-H
GROUP HEALTH SERVICE OF OKLAHOMA, INC., D/B/A BLUE CROSS & BLUE SHIELD OF OKLAHOMA,	)	
DEFENDANT.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Joint Application for a Dismissal With Prejudice filed by the Plaintiffs and the Defendant Group Health Service of Oklahoma, Inc., d/b/a Blue Cross & Blue Shield of Oklahoma, and for good cause shown therein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the above-styled and numbered cause of action is hereby dismissed with prejudice to the filing of any further cause of action.

DATED this 9TH day of JANUARY, 1996.

S/ SVEN ERIK HOLMES

JUDGE OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOANN ALRED,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED

JAN 9 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95-C-305-H

ENTERED ON DOCKET
DATE 1-10-96

ORDER

This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, JoAnn Alred, against the United States of America are hereby dismissed with prejudice.

Dated this 9TH day of JANUARY, 1996.

S/ SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

WYN DEE BAKER, OBA #465
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 9 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

BOB WALLS CHEVROLET/OLDSMOBILE on behalf of itself and all others similarly situated,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation and LEAMON CUMMINGS, an individual,

Defendants.

No. 94-C-1019 H

ENTERED ON DOCKET
DATE 1-10-96

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Stipulation for Dismissal With Prejudice should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein should be and the same is hereby dismissed with prejudice.

IT IS SO ORDERED this 9TH day of JANUARY, 1996.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT COURT JUDGE

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FILED
JAN - 8 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GENERAL DYNAMICS CORPORATION, a Delaware corporation,

Plaintiff,

vs.

INTERSOURCE, INC., an Oklahoma corporation,

Defendant.

No. 95-C-286-B

ENTERED ON DOCKET
DATE JAN 10 1996

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed this date, Judgment is hereby entered in favor of General Dynamics Corporation and against InterSource, Inc., in the principal sum of Eight Hundred Twenty Thousand Five Hundred Thirteen and 37/100 Dollars ($820,513.37). Said judgment shall bear interest at the rate of 5.35% per annum from and after the date hereon. Costs are hereby assessed against the Defendant if timely applied for pursuant to Local Rule 54.1. Any claim for attorneys fees must be timely filed pursuant to Local Rule 54.2.

DATED this 8th day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(46)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GENERAL DYNAMICS CORPORATION, a Delaware corporation,

Plaintiff,

vs.

INTERSOURCE, INC., an Oklahoma corporation,

Defendant.

No. 95-C-286-B

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

General Dynamics Corporation ("General Dynamics") commenced this action against InterSource, Inc. ("InterSource") to recover $779,085.20, on theories of money had and received, quasi contract, unjust enrichment, failure of consideration, mistake of fact, breach of expressed contract, breach of implied contract, indemnity, and constructive trust. The amount claimed relates to payment of $1,947,713.00, obtained on behalf of General Dynamics by InterSource from the United States, pursuant to a written agreement between the parties in which InterSource claimed it was entitled to a 40% fee for services, the balance being paid to General Dynamics. Approximately one year later the United States asserted that General Dynamics was not entitled to the payment because the United States had previously paid said sum of $1,947,713.00 to General Dynamics. The United States demanded and recovered the total amount of what was determined to be a duplicate payment from General Dynamics.

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The case was tried to the Court sitting without a jury on January 2, 1996. Following consideration of the issues and evidence presented, the applicable law, and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. General Dynamics is a Delaware corporation with its principal place of business in Falls Church, Virginia, and InterSource is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma.

2.* On June 1, 1993, General Dynamics and InterSource entered into a "Contract Agreement".

3.* Pursuant to the Contract Agreement, InterSource agreed to disclose certain information to General Dynamics regarding funds that were classified as "Uncollected, "Unclaimed, or Outstanding by the Agencies, Entities, or Authorities" which maintains such funds. InterSource represented that it had determined that General Dynamics may be entitled to payment of unclaimed funds held by such entities.

4.* Pursuant to the Contract Agreement, General Dynamics agreed to pay InterSource 40% of any funds recovered by InterSource.

5.* By letter dated June 9, 1993, InterSource notified

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*The asterisk represents a fact stipulated by the parties in their Amended Pretrial Order filed December 14, 1995.

General Dynamics that two checks, one in the amount of $1,947,713 and another in the amount of $356,865.25, had been issued from the Treasury Department more than two years prior but had remained uncashed. The $1,947,713.00 check is hereafter referred to as the "Original Check."

6.* Consistent with the Contract Agreement, on July 1, 1993, General Dynamics executed a letter of authorization. The letter of authorization authorized InterSource to act as General Dynamics' agent for purposes of collecting funds owed to General Dynamics.

7.* On July 7, 1993, InterSource made a request to the Defense Finance and Accounting Service ("DFAS") requesting on behalf of General Dynamics that DFAS determine the current status of the two aforementioned checks and, if the checks had not been reissued, to reissue the checks.

8.* On September 1, 1993, DFAS reissued and sent to InterSource a check in the amount of $1,947,713.00 (hereinafter referred to as the Replacement Check).

9.* Pursuant to the express authorization from General Dynamics in the letter of authorization described in paragraph 6 above, InterSource deposited the Replacement Check in an escrow account and drew two checks on the account. One was payable to InterSource in the amount of $779,085.20, and the other was payable to General Dynamics in the amount of $1,168,627.80.

10. On July 13, 1994, approximately ten months after DFAS reissued the Replacement Check, DFAS notified General Dynamics that General Dynamics had previously cashed and received payment of the

Original Check (First Interstate Bk of Denver), the division of General Dynamics involved with the Original Check (Pomona), the account number involved with the Original Check (Acct #2317 124 GEN DYN/CAMDEN), the check number of the Original Check (20255909) and the date of the Original Check (June 19, 1989).

15.* General Dynamics may have been able to determine whether the Original Check was received (or not) from the information on the Replacement Check. However, General Dynamics made no effort to do so. (By the time of the receipt of the Replacement Check General Dynamics would have had to make such determination by checking records in possession of Hughes Missile System Company. See Findings of Fact Nos. 16, 17 and 18).[2]

16.* On August 21, 1993, General Dynamics sold its Air Defense Systems Division, as part of General Dynamics' Space Systems Division, to Hughes Missile Systems Company ("Hughes").

17.* The defense contract for which the Original Check was issued was performed and administered by General Dynamics' Air Defense Systems Division.

18.* A Novation Agreement among General Dynamics, Hughes and the United States of America was entered into in connection with the sale of General Dynamics' Space Systems Division to Hughes.

19.* General Dynamics had received overpayments on defense contracts before the payment at issue in this case and knew that it had a legal obligation to refund such payments.

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[2]The parenthesis is added by the Court.

20.* From the $779,085.20 retained by InterSource in the escrow account and other sources, InterSource paid $286,905.59 for federal and state income taxes for the third and fourth quarters of 1993, attorneys fees of $77,908.52, compensation to its president of $310,545.59 after the payment of state and local taxes attributable to such compensation of $189,454.41 and employee compensation of $38,000.00.

21. Prior to the time the replacement check was received by InterSource, cashed by InterSource, and most of the proceeds disbursed by InterSource, General Dynamics did not have reasonable time and means available to determine that the original check had been paid to and deposited by General Dynamics in 1989.

22. InterSource did not change its position in reliance upon anything that General Dynamics had a legal duty to do or failed to do.

23. Thus, InterSource has been paid $779,085.20 as a 40% finder's fee for funds purportedly uncollected and due and owing General Dynamics, to which it is not entitled. InterSource initiated the matter by representing to General Dynamics that it knew of funds which may be due and payable to General Dynamics of which General Dynamics was not aware. The net result is that the subject funds were not uncollected funds due and payable to General Dynamics because they had been paid to General Dynamics by the federal government pursuant to a contract years earlier.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject

matter of this action based on diversity of citizenship and the amount in controversy exceeds $50,000.00, pursuant to 28 U.S.C. §1332.

2. The Northern District of Oklahoma has venue of this action pursuant to 28 U.S.C. §1391(a), because InterSource has its principal place of business in Tulsa, Oklahoma.

3. Any Finding of Fact above which might be properly characterized a Conclusion of Law is included herein.

4. The written contract between the parties provides that it is to be interpreted in accordance with the law of Oklahoma.

5. InterSource has received funds which in equity and good conscience it should not be permitted to retain, due to the mistaken issuance of the Replacement Check by the United States. Ryan v. Spaniol, 193 F.2d 551 (10th Cir. 1951); Gray v. Cornelius, 40 F.2d 67 (N.D. Okla. 1930); and Continental Oil Co. v. Rapp, 301 P.2d 198 (Okla. 1956).

6. General Dynamics is entitled to recover the subject funds due to a mistake of fact. Associates Discount Corp. v. Clements, 321 P.2d 673 (Okla. 1958); Continental Oil Co. v. Rapp, 301 P.2d 198 (Okla. 1956); Sawyer v. Mid-Continent Petroleum Corp., 236 F.2d 518 (10th Cir. 1956); Leasing Service Corp. v. Hobbs Equipment Co., 894 F.2d 1287 (11th Cir. 1990); ITT World Directories, Inc. v. CIA. Editorial De Listas, S.A., 525 F.2d 697 (2nd Cir. 1975); Insurance Brokers Service, Inc. v. Marsh & McLennan, 665 F.Supp. 649 (N.D. Ill. 1987); and National Bank of Canada v. Artex Industries, Inc., 627 F.Supp. 610 (S.D.N.Y. 1986).

7. General Dynamics is entitled to recover the subject funds from InterSource for breach of express contract. The contract provided that InterSource would be entitled to its 40% of the "funds recovered" ". . . that client (General Dynamics) may be rightful beneficiary, co-owner, or sole owner of an interest in funds, . . . or that there may be sums payable or outstanding funds . . . , which as of the date hereof, are uncollected by client (General Dynamics)." Such funds were not as of the date of the written contract due and uncollected by General Dynamics because they had already been paid to General Dynamics by the United States and collected by General Dynamics four years earlier in 1989. Thus, the contract was breached because no uncollected funds due General Dynamics were recovered by InterSource.

8. General Dynamics is entitled to recover from InterSource the principal sum of $779,085.20, interest paid to DFAS on such amount of $41,403.17, and an administrative fee charged by DFAS to General Dynamics in connection with such amount of $25.00. The total sum is $820,513.37.

9. A separate Judgment in keeping with these Findings of Fact and Conclusions of Law shall be entered contemporaneous with the filing of said Findings and Conclusions.

IT IS SO ORDERED this 8th day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER McMULLIN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 95-C-1018-B

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his convictions for rape and kidnapping in Tulsa County District Court, Case No. CRF-83-3737. Petitioner contends he has been denied a direct appeal of his convictions. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below the Court concludes that this petition should be denied.

On June 21, 1984, a jury convicted Petitioner of rape and kidnapping and the trial court sentenced him to 200 years and 101 years, to run consecutively. Although Petitioner's retained counsel filed a notice of intent of appeal, he failed to perfect the appeal. On June 4, 1993, the Tulsa County District Court reluctantly recommended that Petitioner be granted an appeal out of time and appointed the Oklahoma Indigent Defense System (OIDS) to determine whether Petitioner desired representation. On November 10, 1993, the Oklahoma Court of Criminal Appeals (OCCA) granted an appeal out of time and directed "[t]he attorney of record . . . to

lodge the appeal in accordance with the Rules of the Oklahoma Court of Criminal Appeals, 22 O.S.Supp. 1993, Ch. 18, App., with time periods commencing on the date of this order." Petitioner, however, moved to have counsel withdraw as he desired to proceed pro se. The district court and the court of appeals granted that request.

On May 31, 1994, Petitioner filed a Petition in Error and a designation of record on appeal in his post-conviction appeal. On July 5, 1994, he filed his appellant brief in the same post-conviction appeal. Thereafter, on June 5, 1995, Petitioner filed a Motion for Disposition and Request for Sanctions. He requested the State be sanctioned for not filing a response brief and moved the Court to rule on the appeal. The OCCA denied the request, noting that "Appellant ha[d] never actually initiated an appeal in this Court because neither Appellant nor his former attorney of record filed a notice of intent to appeal and designation of record and the time for doing so has long since passed.

In the instant habeas action, Petitioner contends he timely filed his Petition in Error and designation of record on appeal and requests this Court to issue an order directing the OCCA to proceed with his appeal. In the alternative, he requests the Court issue an order directing his release from custody for violation of the Due Process Clause. Respondent replies the OCCA's decision--declining to rule on the appeal--was proper because Petitioner never initiated an appeal. This Court agrees. The Petition in Error and Designation of Record were filed after the statutorily

permitted time. Moreover, Petitioner never filed a Notice of Intent to Appeal with the clerk of the district court or the clerk of the OCCA. Because Petitioner desired to proceed pro se, his pro se status does not excuse his failure to comply with procedural rules.[1] See United States v. Flewitt, 874 F.2d 669, 675 (9th Cir. 1989); United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984); Bowen v. State, 606 P.2d 589 (Okla. Crim. App. 1980); see also United States v. Gowen, 32 F.3d 1466 (10th Cir. 1994) (Defendant who chose to represent himself was responsible for ascertaining prosecution psychologist's area of expertise and for preparing to defend against psychologist's testimony about whether victim of alleged sexual assault suffered from posttraumatic stress disorder). Therefore, Petitioner's failure to file a direct appeal was through fault of his own and the petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 9th day of Jan, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] In his reply, Petitioner concedes he is not raising ineffective assistance of appellate counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MASSEY GAS SYSTEMS, a Tennessee general partnership,

Plaintiff,

vs.

PRODUCERS PIPELINE CORPORATION a Delaware corporation, successor by merger to Normandy Oil and Gas Company, Inc., a New York corporation; NORMANDY GATHERING AND PROCESSING CORPORATION, a Delaware corporation; NORTHEAST UTAH GAS CORPORATION, a Texas corporation; and ROY T. RIMMER, JR.,

Defendants.

Case No. 95-C-218-B

ENTERED ON DOCKET

DATE JAN 10 1996

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff Massey Gas Systems, a Tennessee general partnership, and Defendants Producers Pipeline Corporation, a Delaware corporation, successor by merger to Normandy Oil and Gas Company, Inc., a New York corporation; Normandy Gathering and Processing Corporation, a Delaware corporation; Northeast Utah Gas Corporation, a Texas corporation; and Roy T. Rimmer, Jr., pursuant to Rule 41(a)(ii) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, with prejudice to refiling.

Respectfully submitted,

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Attorney for Plaintiff

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MASSEY GAS SYSTEMS, a Tennessee general partnership,

Plaintiff,

vs.

PRODUCERS PIPELINE CORPORATION a Delaware corporation, successor by merger to Normandy Oil and Gas Company, Inc., a New York corporation; NORMANDY GATHERING AND PROCESSING CORPORATION, a Delaware corporation; NORTHEAST UTAH GAS CORPORATION, a Texas corporation; and ROY T. RIMMER, JR.,

Defendants.

Case No. 95-C-218-B

FILED

JAN - 9 1996

Phil Lombardi, Clerk

ENTERED ON DOCKET

DATE JAN 10 1996

ORDER

UPON the Joint Stipulation for Dismissal with Prejudice filed by Plaintiff and Defendants, it is hereby

ORDERED, that Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, are hereby DISMISSED, with prejudice to refiling.

DONE this 9 day of Jan., 1996.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOY BLEDSAW,

Plaintiff(s),

vs.

CARPET TRANSPORT, INC.,

Defendant(s).

Case No. 95-C-664-B

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 9th day of January, 1996.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

(9)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OTIS W. CRANE,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant.

Case No. 94-C-651-B

J U D G M E N T

In accord with this Court's Order entered December 27, 1995, affirming the Magistrate Judge's Report and Recommendation affirming the Secretary's decision, Judgment is hereby entered in favor of Defendant and against Plaintiff on all claims. Costs are assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1.

DATED THIS 9th DAY OF JANUARY, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(10)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 10 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MASSEY GAS SYSTEMS, a Tennessee general partnership,

Plaintiff,

vs.

PRODUCERS PIPELINE CORPORATION a Delaware corporation, successor by merger to Normandy Oil and Gas Company, Inc., a New York corporation; NORMANDY GATHERING AND PROCESSING CORPORATION, a Delaware corporation; NORTHEAST UTAH GAS CORPORATION, a Texas corporation; and ROY T. RIMMER, JR.,

Defendants.

Case No. 95-C-218-B

ENTERED ON DOCKET

DATE JAN 10 1996

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff Massey Gas Systems, a Tennessee general partnership, and Defendants Producers Pipeline Corporation, a Delaware corporation, successor by merger to Normandy Oil and Gas Company, Inc., a New York corporation; Normandy Gathering and Processing Corporation, a Delaware corporation; Northeast Utah Gas Corporation, a Texas corporation; and Roy T. Rimmer, Jr., pursuant to Rule 41(a)(ii) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, with prejudice to refiling.

Respectfully submitted,

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MASSEY GAS SYSTEMS, a Tennessee general partnership,

Plaintiff,

vs.

PRODUCERS PIPELINE CORPORATION a Delaware corporation, successor by merger to Normandy Oil and Gas Company, Inc., a New York corporation; NORMANDY GATHERING AND PROCESSING CORPORATION, a Delaware corporation; NORTHEAST UTAH GAS CORPORATION, a Texas corporation; and ROY T. RIMMER, JR.,

Defendants.

Case No. 95-C-218-B

ORDER

UPON the Joint Stipulation for Dismissal with Prejudice filed by Plaintiff and Defendants, it is hereby

ORDERED, that Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, are hereby DISMISSED, with prejudice to refiling.

DONE this 9 day of Jan., 1996.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EVERARDO MARQUEZ aka EVERARDO R. MARQUEZ; PEGGY A. MARQUEZ aka PEGGY ANN MARQUEZ; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 541K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of January, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear not having claimed no interest in the subject property; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel Kim D. Ashley; and the Defendants, EVERARDO MARQUEZ aka EVERARDO R. MARQUEZ and PEGGY A. MARQUEZ aka PEGGY ANN MARQUEZ, appear not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, EVERARDO MARQUEZ aka EVERARDO R. MARQUEZ will hereinafter be referred to as ("EVERARDO MARQUEZ") and the Defendant, PEGGY A. MARQUEZ aka

PEGGY ANN MARQUEZ will hereinafter be referred to as ("PEGGY A. MARQUEZ"). The Defendants, EVERARDO MARQUEZ and PEGGY A. MARQUEZ are both single, unmarried persons.

The Court being fully advised and having examined the court file finds that the Defendant, PEGGY A. MARQUEZ, waived service of Summons on June 22, 1995; and that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on June 16, 1995.

The Court further finds that the Defendant, EVERARDO MARQUEZ, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 27, 1995, and continuing through November 1, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, EVERARDO MARQUEZ, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, EVERARDO MARQUEZ. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing

and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on June 27, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on July 10, 1995; and that the Defendants, EVERARDO MARQUEZ and PEGGY A. MARQUEZ, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Sixteen (16) in Block One (1), of RICHFIELD ADDITION, a Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on February 14, 1990, the Defendants, EVERARDO MARQUEZ and PEGGY A. MARQUEZ, executed and deliveAred to First

Mortgage Corp. their mortgage note in the amount of $43,550.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, EVERARDO MARQUEZ and PEGGY A. MARQUEZ, then husband and wife, executed and delivered to First Mortgage Corp. a mortgage dated February 14, 1990, covering the above-described property. Said mortgage was recorded on February 15, 1990, in Book 5236, Page 1697, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1990, FIRST MORTGAGE CORP. assigned the above-described mortgage note and mortgage to Fleet Mortgage Corp. This Assignment of Mortgage was recorded on March 13, 1990, in Book 5240, Page 2530, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 24, 1992, Fleet Mortgage Corp. assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, his successors and assigns. This Assignment of Mortgage was recorded on July 30, 1992, in Book 5423, Page 2142, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 25, 1992, the Defendants, EVERARDO MARQUEZ and PEGGY A. MARQUEZ, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 22, 1993, February 19, 1993, and December 1, 1993.

The Court further finds that the Defendant, EVERARDO MARQUEZ, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, EVERARDO MARQUEZ, is indebted to the Plaintiff in the principal sum of $55,427.72, plus interest at the rate of 10 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has an interest in the property which is the subject matter of this action by virtue of a tax warrant in the amount of $766.85 which became a lien on the property as of November 1, 1994, and a lien in the amount of $152.95 which became a lien as of December 13, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, EVERARDO MARQUEZ and PEGGY A. MARQUEZ, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, EVERARDO MARQUEZ, in the principal sum of $55,427.72, plus interest at the rate of 10 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.35 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of $919.80 for state taxes, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, EVERARDO MARQUEZ, PEGGY A. MARQUEZ, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, EVERARDO MARQUEZ, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of $919.80, plus accrued and accruing interest, for state taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

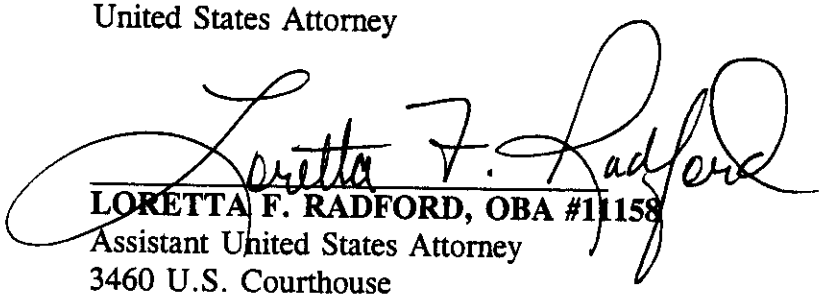
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
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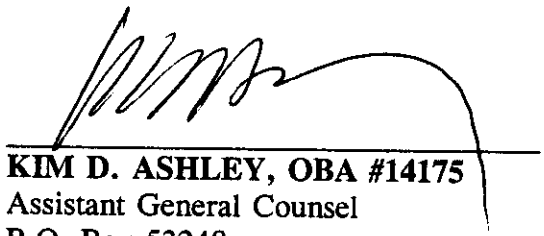

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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95C 541K

LFR/lg

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACK JAMES,)
)
Petitioner,)
)
vs.) No. 95-C-1021-K
)
RITA ANDREWS,)
)
Respondent.)

ORDER

This matter comes before the Court on Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies. (Doc. #3.) Petitioner has not responded.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted all the various grounds for relief he has alleged. Moreover, Petitioner's failure to object to Respondent's motion to

4

dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, Respondent's motion to dismiss (docket #3) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed without prejudice.**

IT IS SO ORDERED this 8 day of January, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ANDREW MIKUS,

Plaintiff,

vs.

E.R. "NED" TURNBULL, ROBERT J. WALPOLE, STEVE SEWELL, JIM THOMAS, and SHEILA NAIFEH,

Defendants.

No. 95-C-293-K

O R D E R

On December 11, 1995 Magistrate Judge Wagner entered his Report and Recommendation regarding various motions. The Magistrate Judge recommended defendants' motions to dismiss be granted, and plaintiff's motions for summary judgment and for transcripts be found moot. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the motions of the defendants to dismiss are hereby GRANTED. All other motions are declared moot.

ORDERED this 9 day of January, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

15

blc

OBA #12042

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM G. BROWN and JUDY BROWN, Plaintiffs, -vs- FRED C. VANARSDALE, JEFF CURTZ, TOMMY OSBORN, JR., NATIONAL AMERICAN INSURANCE COMPANY and UNDERWRITERS SURETY, INC., Defendants. TOMMY OSBORN, JR., Defendant and Third Party Plaintiff, -vs- UNDERWRITERS SURETY, INC., Third Party Defendant.	)	No. 95 C 272 K

ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANTS

This cause came on to be heard on the Joint Application of plaintiffs and defendants Fred C. Vanarsdale, National American Insurance Company and Underwriters Surety, Inc., for a voluntary dismissal with prejudice of plaintiffs' claims against all defendants. After reviewing the Joint Application, this Court finds plaintiffs have settled their claims and that Dismissal With Prejudice as to refiling of the same should be ordered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs' claims against defendants Fred C. Vanarsdale, Jeff Curtz, Tommy Osborn, Jr., National American Insurance Company and Underwriters

Surety, Inc., are dismissed with prejudice against refiling of those claims.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

blc

OBA #12042

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM G. BROWN and JUDY BROWN,	)	
Plaintiffs,	)	
-vs-	)	No. 95 C 272 K
FRED C. VANARSDALE, JEFF CURTZ, TOMMY OSBORN, JR., NATIONAL AMERICAN INSURANCE COMPANY and UNDERWRITERS SURETY, INC.,	)	
Defendants.	)	
TOMMY OSBORN, JR.,	)	
Defendant and Third Party Plaintiff,	)	
-vs-	)	
UNDERWRITERS SURETY, INC.,	)	
Third Party Defendant.	)	

ORDER DISMISSING DEFENDANT NATIONAL'S CROSS-CLAIM AGAINST DEFENDANT UNDERWRITERS

This cause came on to be heard on the Joint Application of defendants National American Insurance Company ("National") and Underwriters Surety, Inc., ("Underwriters") for a voluntary dismissal without prejudice of National's cross-claim against Underwriters. After reviewing the Joint Application, this Court finds that National has entered into a settlement agreement as to its cross claim and that dismissal without prejudice should be ordered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES ROBERSON; HELEN L. ROBERSON; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 1028K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9 day of January, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear not having claimed no interest in the subject property; and the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, each waived service of Summons on November 1, 1995.

The Court further finds that the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON are husband and wife.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on October 25, 1995; and that the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Eleven (11) , Block Five (5), of Lots 1 through 7 of Block 2, Lots 6 through 20 of Block 3, Lots 4 through 19 of Block 4, Lots 6 through 20 of Block 5, and all of Blocks 6 through 19, KENDALWOOD IV ADDITION to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on January 31, 1986, the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, executed and delivered to MIDFIRST MORTGAGE CO. their mortgage note in the amount of $50,343.00, payable in monthly installments, with interest thereon at the rate of eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, CHARLES ROBERSON AND HELEN L. ROBERSON, husband and wife, executed and delivered to MIDFIRST MORTGAGE CO. a mortgage dated January 31, 1986, covering the above-described property. Said mortgage was recorded on February 7, 1986, in Book 4923, Page 1626, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1986, MIDFIRST MORTGAGE CO. assigned the above-described mortgage note and mortgage to MIDLAND MORTGAGE

CO. This Assignment of Mortgage was recorded on January 26, 1987, in Book 4997, Page 1007, in the records of Tulsa County, Oklahoma. A corrected assignment dated April 21, 1987, was recorded on May 6, 1987 in Book 5021, Page 1143 in the records of Tulsa County, Oklahoma.

The Court further finds that on December 23, 1987, MIDLAND MORTGAGE CO. assigned the above-described mortgage note and mortgage to MIDFIRST SAVINGS AND LOAN. This Assignment of Mortgage was recorded on December 30, 1987, in Book 5072, Page 1491, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 21, 1989, MID-FIRST SAVINGS AND LOAN assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 24, 1989, in Book 5179, Page 838, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1989, the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on October 18, 1990, October 4, 1991, January 14, 1992, and December 26, 1992.

The Court further finds that the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by

reason thereof the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, are indebted to the Plaintiff in the principal sum of $74,514.91, plus interest at the rate of 11 percent per annum from September 19, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, in the principal sum of $74,514.91, plus interest at the rate of 11 percent per annum from September 19, 1995 until judgment, plus interest thereafter at the current legal rate of 5.35 percent per annum until paid, plus the costs of this action in the amount, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CHARLES ROBERSON, HELEN L. ROBERSON, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, CHARLES ROBERSON and HELEN L. ROBERSON, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 95-C 1028K

LFR/lg

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLARK E. CHAMBERS,

Plaintiff,

v.

Case No: 94-C-1013-W

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed January 5, 1996.

Dated this 8th day of January, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL MACK,)
)
Plaintiff,)
)
vs.) No. 95-C-1181-E
)
RON CHAMPION, et al.,)
)
Defendants.)

ORDER

On December 1, 1995, Plaintiff submitted a "Petition for Writ of Mandamus." On December 6, 1995, the Clerk of the Court notified Plaintiff that in forma pauperis motion, summons, and Marshal forms had not been submitted. On December 14, 1995, Plaintiff resubmitted his "Petition for Writ of Mandamus" along with the requested documents, but due to a clerical error the Clerk of the Court opened a new action, Case No. 95-C-1220-H.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE as duplicitous.

SO ORDERED THIS 5th day of January, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DON BYRD, CURTIS GRAYSON, RUSSELL BARNES, CARY McKAUGHAN, LEWIS REYNOLDS and SAM NEWTON,

Plaintiffs,

v.

EAST-WEST AUTO PARTS, INC., an Oklahoma corporation, and KEN FREEMAN and K.C. LOWE, individuals,

Defendants.

Case No. 95-C-720-C

ENTERED ON DOCKET

DATE JAN 09 1996

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of Plaintiff Lewis Reynolds and the Defendants, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Mr. Reynolds, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice, with each party to bear its own fees and costs.

So Ordered this 5 day of Jan, 1996.

(Signed) H. Dale Cook

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Attorney for Plaintiff

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DON BYRD, CURTIS GRAYSON, RUSSELL BARNES, CARY McKAUGHAN, LEWIS REYNOLDS and SAM NEWTON,

Plaintiffs,

v.

EAST-WEST AUTO PARTS, INC., an Oklahoma corporation, and KEN FREEMAN and K.C. LOWE, individuals,

Defendants.

Case No. 95-C-720-C

ENTERED ON DOCKET
DATE JAN 09 1996

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of Plaintiff Sam Newton and the Defendants, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Mr. Newton, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice, with each party to bear its own fees and costs.

So Ordered this 5 day of Jan, 1996.

(Signed) H. Dale Cook

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Attorney for Plaintiff

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DON BYRD, CURTIS GRAYSON, RUSSELL BARNES, CARY McKAUGHAN, LEWIS REYNOLDS and SAM NEWTON,

Plaintiffs,

v.

EAST-WEST AUTO PARTS, INC., an Oklahoma corporation, and KEN FREEMAN and K.C. LOWE, individuals,

Defendants.

Case No. 95-C-720-C

ENTERED ON DOCKET

DATE JAN 09 1996

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of Plaintiff Don Byrd and the Defendants, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Mr. Byrd, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice, with each party to bear its own fees and costs.

So Ordered this 5 day of Jan, 1996.

(Signed) H. Dale Cook

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Attorney for Plaintiff

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 9 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DON BYRD, CURTIS GRAYSON, RUSSELL BARNES, CARY McKAUGHAN, LEWIS REYNOLDS and SAM NEWTON,

Plaintiffs,

v.

EAST-WEST AUTO PARTS, INC., an Oklahoma corporation, and KEN FREEMAN and K.C. LOWE, individuals,

Defendants.

Case No. 95-C-720-C

ENTERED ON DOCKET

DATE JAN 09 1996

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of Plaintiff Russell Barnes and the Defendants, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Mr. Barnes, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice, with each party to bear its own fees and costs.

So Ordered this 5 day of Jan, 1996.

(Signed) H. Dale Cook

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Attorney for Plaintiff

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WALTER CHARLES SMITH,

Petitioner,

v.

RON CHAMPION and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents.

Case No. 95-C-199-B

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

Petitioner's application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is now before the Magistrate Judge for consideration. Petitioner was convicted on July 28, 1993 in Tulsa County District Court, Case No. CRF-92-2970, and sentenced to 18, 10, 10, and 20 years imprisonment, the sentences to run consecutively.

Petitioner seeks federal habeas relief on the alleged grounds that he has suffered a delay and prejudice in perfecting his appeal, because the preliminary hearing transcript cannot be produced and his counsel did not require transcription, thus resulting in an incomplete appeals record.

The court has been notified that the Oklahoma Court of Criminal Appeals issued an order in petitioner's appeal on October 9, 1995, reversing the decision and remanding the case for a new trial. ("See Exhibit A"). Petitioner's petition for a writ of habeas corpus should be dismissed.

(6)

Dated this 5th day of January, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:smith

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH DWAYNE SANDERS,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 95-C-763-H

ORDER

Before the Court are Defendants' motions to dismiss, or in the alternative for summary judgment, filed on December 4 and 13, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1] The Court also notes that Plaintiff's mail was returned to the Court on two different occasions with the notation "address unknown."

Accordingly, Defendants' motions to dismiss and/or for summary judgment (doc. #10 and #12) are **granted** and the above captioned

---

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

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case is hereby **dismissed without prejudice.**

IT IS SO ORDERED.

This 8th day of January, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONLEE GILES,

Plaintiff,

v.

IMTEC, INC., an Oklahoma corporation,

Defendant.

No. 94-C-1090 H

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on before me, the undersigned Judge, upon the Joint Stipulation of Dismissal with Prejudice. The Court finds that this matter should be dismissed with prejudice. This Court shall retain jurisdiction of this matter to resolve any future disputes which may arise in connection with the Settlement Agreement executed by the parties.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-styled cause of action is hereby dismissed with prejudice, each party to bear its own costs and attorney's fees.

DATED this 8TH day of ~~December, 1995~~ JANUARY, 1996.

S/ SVEN ERIK HOLMES

JUDGE OF THE DISTRICT COURT

Prepared by:

Stephen Q. Peters, Esq.
Harris, McMahan & Peters
1924 S. Utica, Suite 700
Tulsa, Oklahoma 74101
(918) 743-6201
ATTORNEYS FOR PLAINTIFF

and

William D. Toney, OBA #9060
Randall G. Vaughan, OBA #11554
Kevin P. Doyle, OBA #13269
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103-4218
(918) 581-5500
ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONLEE GILES, Plaintiff,	)	
v.	)	No. 94-C-1090 H
IMTEC, INC., an Oklahoma corporation, Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on before me, the undersigned Judge, upon the Joint Stipulation of Dismissal with Prejudice. The Court finds that this matter should be dismissed with prejudice. This Court shall retain jurisdiction of this matter to resolve any future disputes which may arise in connection with the Settlement Agreement executed by the parties.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-styled cause of action is hereby dismissed with prejudice, each party to bear its own costs and attorney's fees.

DATED this 8TH day of ~~December, 1995~~ JANUARY, 1996.

S/ SVEN ERIK HOLMES
JUDGE OF THE DISTRICT COURT

Prepared by:

Stephen Q. Peters, Esq.
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1924 S. Utica, Suite 700
Tulsa, Oklahoma 74101
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ATTORNEYS FOR PLAINTIFF

and

William D. Toney, OBA #9060
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ATTORNEYS FOR DEFENDANT

kpd\plds\imtc-ord.dis

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMY DALE BARRETT,

Plaintiff,

vs.

TULSA COUNTY JAIL, et al.,

Defendants.

No. 95-C-1230-H

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. In reliance upon the representations and information set forth in the motion, the Plaintiff is hereby permitted leave to file and maintain this action to conclusion without prepayment of fees or costs.

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis is **granted**. The Clerk is **directed** to cause summons to be issued and served without prepayment of fees and costs as to Stanley Glanz, Bill Thompson, Earl McClaflin, and Mark Lechtenberg. The City of Tulsa is **dismissed** as it does not operate the Adult Detention Center (ADC) where the events at issue took place. See 28 U.S.C. § 1915(d). The Clerk shall **mail** a copy of the complaint to the Plaintiff.

IT IS SO ORDERED.

This 8TH day of JANUARY 1996.

Sven Erik Holmes
United States District Judge

3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL MACK,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 95-C-1220-H

ORDER

Petitioner, a state prisoner, has filed a motion for leave to proceed in forma pauperis and a petition for a writ of mandamus pursuant to 28 U.S.C. § 1361. Petitioner requests an order compelling the Oklahoma Department of Corrections to comply with the original order of Judge Bohannon in Battle v. Anderson, 376 F.Supp. 402 (E.D. Okla. 1974).

Even if the Court liberally construes Petitioner's action as a one in the nature of mandamus,[1] the Court lacks subject matter jurisdiction to compel Ron Champion, an officer of the State of Oklahoma, to perform a duty owed to Petitioner.[2] See 28 U.S.C. § 1361 (providing that federal court has jurisdiction to compel an officer or employee of the United States to perform a duty owed to plaintiff). Accordingly, Petitioner's action in the nature of mandamus is hereby **dismissed for lack of subject matter jurisdiction**. Petitioner's motion for leave to proceed in forma

---

[1] The writ of mandamus has been abolished, see Fed. R. Civ. P. 81(b)

[2] While Petitioner has submitted summons and Marshal forms for Ron Colliver, Roy Wright, and Harold Betin, he has not named them in his petition for writ of mandamus.

3

pauperis (docket #2) is **granted**. The Clerk shall **mail** to Petitioner the extra copies of his petition for writ of mandamus, summons, and marshal forms. The Clerk shall also **mail** to Petitioner the requisite forms and instructions for filing a civil rights action pursuant to 42 U.S.C. § 1983.

IT IS SO ORDERED.

This 8TH day of January, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM DAVID HAFF,

Plaintiff,

vs.

WASHINGTON COUNTY JAIL, MIKE SILVA, and CURTIS DELAP,

Defendants.

No. 95-C-1201-H

JAN 8 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ENTERED ON DOCKET
DATE 1-9-96

ORDER

Plaintiff, an inmate at the Washington County Jail, has filed a motion for leave to proceed in forma pauperis, a civil rights complaint, and a "petition for writ of mandamus." In Counts I and II of the complaint, Plaintiff challenges the conditions of his confinement under the Eighth and the Fourteenth Amendment and his right of access to the courts. In Count III of the complaint and in the "petition for writ of mandamus," Plaintiff challenges his detainment at the Washington County Jail under the Interstate Agreement on Detainers Act (IAD) and requests that he be released from custody.

Plaintiff's request for release from custody is cognizable only in a habeas corpus action. See Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994). See also Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). Accordingly, Count III of the complaint and Petitioner's "petition for writ of mandamus" are DISMISSED WITHOUT PREJUDICE. The Clerk shall MAIL to Plaintiff the requisite forms and instructions for filing a petition for a writ of habeas corpus.

Plaintiff's motion for leave to proceed in forma pauperis

H

(docket #2) as to Counts I and II is GRANTED. Plaintiff shall COMPLETE the enclosed summons and Marshal forms and RETURN them to the Court on or before twenty (20) days from the date of filing of this order.

IT IS SO ORDERED.

This 8TH day of JANUARY 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES P. MARTIN,

Petitioner,

vs.

STATE OF OKLAHOMA,
LARRY FIELDS,

Respondent.

No. 95-C-1134-H

ORDER

On November 14, 1995, Petitioner filed the instant petition for a writ of habeas corpus, but did not submit the $5.00 filing fee or a motion for leave to proceed in forma pauperis. On December 7, 1995, the Clerk of the Court notified him of this deficiency. As of the date of this order, Petitioner has yet to comply with the above request. Accordingly, this action is hereby DISMISSED for failure to pay the filing fee or submit a motion for leave to proceed in forma pauperis. See Local Rule 5.1(F).

IT IS SO ORDERED.

This 8TH day of JANUARY 1996.

Sven Erik Holmes
United States District Judge

FILED

JAN - 8 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DYNAMIC ENERGY RESOURCES, INC., a Delaware corporation,

Plaintiff,

vs.

WILLIAM STUART PRICE, an Individual, and DENVER OIL & MINERAL CORPORATION, an Oklahoma corporation,

Defendants.

Case No. 95-C-661-BU

ENTERED
DATE JAN 0 1996

DISMISSAL WITH PREJUDICE

The Plaintiff, Dynamic Energy Resources, Inc., by and through its undersigned counsel and pursuant to Fed.R.Civ.P. 41(a)(1)(i), dismisses the above action with prejudice to its refiling, with each party to bear its respective costs and attorneys fees.

DYNAMIC ENERGY RESOURCES, INC.

By: _____

Joel L. Wohlgemuth, OBA #9811
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918)583-7571
Attorneys for Plaintiff

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the ____ day of January, 1996, a true and correct copy of the above and foregoing Dismissal With Prejudice was mailed, with proper postage thereon, to:

C. S. Lewis, III, Esq.
Scott P. Kirtley, Esq.
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
P. O. Box 1046
Tulsa, Oklahoma 74101

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NORMA SELLS,	)	ENTERED ON DOCKET
	)	DATE JAN 09 1996
Plaintiff,	)	
	)	**CIVIL NO. 94-C-642-B**
v.	)	
	)	
UNITED STATES OF AMERICA,	)	FILED
	)	
Defendant.	)	JAN - 8 1996

Richard M. Lawrence, Court Clerk

STIPULATION OF DISMISSAL

The plaintiff, Norma Sells, by her attorney of record, Jef Stites, and the defendant, United States Postal Service, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and Mark Dennett, Attorney, United States Postal Service, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 8th day of January, 1996.

MICHAEL R. GREEN
3736 E. 31st Street
Tulsa, OK 74135-1506

JEF STITES, ESQ.
3736 E. 31st Street
Tulsa, OK 74135-1506

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN - 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAY JEROME SPRADLING; CLAY JEROME SPRADLING, JR.; LORETTA J. SPRADLING; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 194B

ENTERED ON DOCKET
DATE JAN 09 1996

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of Jan., 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel, Kim D. Ashley; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by City Attorney Michael D. Vanderburg; and the Defendants, CLAY JEROME SPRADLING, CLAY JEROME SPRADLING, JR., and LORETTA J. SPRADLING, appear not, but make default.

NOTE: [illegible]
BY [illegible]
PRO SE LITIGANTS [illegible]
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, CLAY JEROME SPRADLING, acknowledged receipt of Summons and Complaint via certified mail on April 20, 1995; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on March 29, 1995; and that the Defendant, CITY OF BROKEN ARROW, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on March 2, 1995.

The Court further finds that the Defendant, CLAY JEROME SPRADLING, JR., was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 13, 1995, and continuing through October 18, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, CLAY JEROME SPRADLING, JR., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, CLAY JEROME SPRADLING, JR. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the

Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on March 17, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on March 29, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on March 22, 1995; and that the Defendants, CLAY JEROME SPRADLING, CLAY JEROME SPRADLING, JR. and LORETTA F. SPRADLING, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, CLAY JEROME SPRAdLING, JR. and LORETTA J. SPRADLING are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Nineteen (19), Block Five (5), STACEY LYNN FIFTH ADDITION to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on January 27, 1987, the Defendant, CLAY JEROME SPRADLING, executed and delivered to Sears Mortgage Corporation his mortgage note in the amount of $49,050.00, payable in monthly installments, with interest thereon at the rate of eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CLAY JEROME SPRADLING, executed and delivered to Sears Mortgage Corporation a mortgage dated January 27, 1987, covering the above-described property. Said mortgage was recorded on January 28, 1987, in Book 4998, Page 176, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, Sears Mortgage Corporation assigned the above-described mortgage note and mortgage to Independence One Mortgage Corporation. This Assignment of Mortgage was recorded on February 5, 1988, in Book 5078, Page 2489, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 18,1991, Independence One Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 22, 1991, in Book 5336, Page 1450, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 21, 1991, the Defendants, CLAY JEROME SPRADLING, JR. and LORETTA J. SPRADLING, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, CLAY JEROME SPRADLING, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CLAY JEROME SPRADLING, is indebted to the Plaintiff in the principal sum of $64,085.76, plus interest at the rate of 8 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $48.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $31.00 which became a lien as of June 25, 1993; and a lien in the amount of $34.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has a lien on the subject property which is the subject matter of this action by virtue of state taxes in the amount of $275.60, which became a lien as of April 18, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title, or interest in the subject property except insofar as it is the lawful holder of certain easements according to the duly recorded plat.

The Court further finds that the Defendants, CLAY JEROME SPRADLING, CLAY JEROME SPRADLING, JR., and LORETTA J. SPRADLING, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, CLAY JEROME SPRADLING, in the principal sum of $64,085.76, plus interest at the rate of 8 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.35 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $113.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of $275.60 for state taxes, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title, or interest in the subject property except insofar as it is the lawful holder of certain easements according to the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CLAY JEROME SPRADLING, CLAY JEROME SPRADLING, JR., LORETTA J. SPRADLING and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CLAY JEROME SPRADLING, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of $275.60, plus accrued and accruing interest for state taxes currently due and owing.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $113.00, personal property taxes which are currently due and owing.

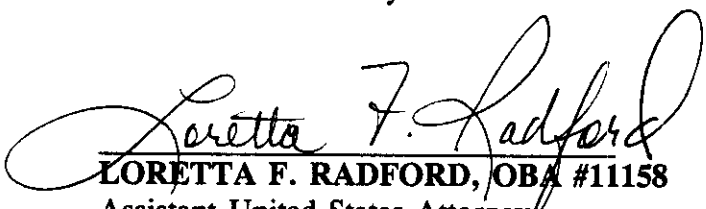
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

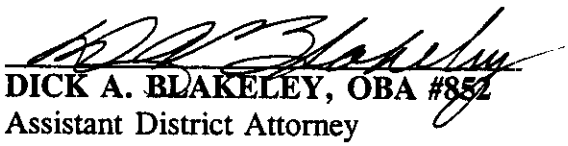
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
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Tulsa, Oklahoma 74103
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Attorney for Defendants,
County Treasurer and
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Tulsa County, Oklahoma

KIM D. ASHLEY, OBA #14175
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State of Oklahoma ex rel
Oklahoma Tax Commission

MICHAEL R. VANDERBURG, OBA #9180
City Attorney
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Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 194B

LFR/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN - 8 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

PAUL EVERLY,

Plaintiff,

vs.

MIKE SILVA, et al.,

Defendants.

No. 95-C-598-B

ENTERED ON DOCKET
DATE JAN 09 1996

ORDER

Before the Court are Defendants' motions to dismiss or, in the alternative, for special report. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1] Accordingly, Defendants' motions to dismiss (docket #3 and #4) are **granted** and the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 5 day of Jan, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

---

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES EDMOND CAGLE,)
)
Petitioner,)
)
vs.) No. 95-C-993-B
)
RON CHAMPION,)
)
Respondent.)

ORDER OF TRANSFER

Before the court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Seminole County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

Accordingly, Petitioner's application for a writ of habeas corpus is hereby **transferred** to the Eastern District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 8th day of Jan., 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PAMELA S. PILGRIM,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of the Social Security Administration,

Defendant.

Case No. 95-C-543-H M

AGREED ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for a *de novo* hearing pursuant to sentence 6 of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

DATED this 8 day of January 1996.

S/Frank H. McCarthy
U.S. Magistrate

SVEN ERIC HOLMES
United States District Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

By: _____

PHIL PINNELL, OBA #7169
Assistant United States Attorney
33 West Fourth Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

PAMELA S. PILGRIM, Plaintiff

_____

TIMOTHY M. WHITE, OBA #9552
Attorney for Plaintiff
Atlanta South Office Complex
2526 E. 71st Street, Suite A
Tulsa, Oklahoma 74136-5576
(918) 492-9335

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRENDA HAMPTON-HIGGINS,

Plaintiff,

vs.

WARREN PETROLEUM COMPANY, a subsidiary of CHEVRON USA, INC., JOHN PAUL KLEIN; TULSA REGIONAL MEDICAL CENTER; and MICHAEL D. DUBRIWNY, M.D.,

Defendants.

Case No. 95-C-849B

ORDER

Upon Motion of the Plaintiff, this court hereby dismisses without prejudice Plaintiff's wrongful discharge claim against Warren Petroleum Company, a subsidiary of Chevron USA, Inc., and John Klein.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re:

FILED

JAN - 5 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Amos Andrew Decker, Mary Grace Decker, Debtors., Kaimacha Kennels, Inc., Appellant, vs. Kenneth L. Stainer, Trustee and Amos Andrew Decker and Mary Grace Decker, Appellees.	)	Case No. 95-C-277-B ENTERED ON DOCKET DATE JAN - 8 1996

STIPULATION OF DISMISSAL

Kaimacha Kennels, Inc., Appellant; Kenneth L. Stainer, Trustee; and Amos Andrew Decker and Mary Grace Decker, Appellees, hereby submit their Stipulation of Dismissal in the captioned appeal.

On November 6, 1995, an Order was entered by the Bankruptcy Court allowing a settlement between the parties. One of the terms of the settlement agreement was that Kaimacha Kennels, Inc. would dismiss their appeal against Kenneth L. Stainer. Trustee and Amos Andrew Decker and Mary Grace Decker. It is therefore appropriate that this appeal be dismissed.

IT IS THEREFORE ORDERED that the above-captioned appeal is hereby dismissed.

Dated this 5th day of ~~December~~, 1996.

S/ THOMAS R. BRETT

United States ~~Magistrate~~ District Judge

APPROVED AS TO FORM AND CONTENT:

Morrel, West, Saffa, Craige & Hicks, Inc.

By _____
Mark A. Craige, OBA #1992
City Plaza West, 9th Floor
5310 East 31st Street
Tulsa, OK 74135
(918) 664-0800 Telephone
(918) 663-1383 Facsimile
Attorneys for Kaimacha Kennels, Inc.

Kenneth L. Stainer, Trustee

By _____
Randolph P. Stainer, OBA # 8537
600 Beacon Building
406 South Boulder
Tulsa OK 74103
(918) 584-6404 Telephone
Attorney for Kenneth L. Stainer, Trustee

Frasier & Frasier

By _____
Gary Brasel, OBA #1080
1700 S.W. Boulevard
Post Office Box 799
Tulsa, Oklahoma 74101-0799
Attorneys for Amos Andrew Decker and Mary Grace Decker

Amber\R\9193-2.p04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE L. ANDERSON,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign corporation,

Defendant.

Case No. 94-C-1193-B

O R D E R

Before the Court is Plaintiff Eddie L. Anderson's Application to File his Response to Defendant's Second Motion for Summary Judgment Out of Time, and Motion to hold said Motion for Summary Judgment in Abeyance (Docket #28).

On August 24, 1995, the Court certified a question to the Oklahoma Supreme Court on the issue of bad faith as pertaining to workers' compensation insurance carriers. Subsequently, Defendant filed a Motion for Summary Judgment as to Plaintiff's intentional infliction of emotional distress claim. Plaintiff's Response Brief was filed a week after the Court-ordered deadline. At this time, the Court hereby grants Plaintiff's motion to file said response brief out of time.

The Court also grants Plaintiff's motion to hold Defendant's Motion for Summary Judgment in abeyance pending an answer from the Oklahoma Supreme Court to the certified question. The Court hereby stays this case until the Court receives an answer to the certified

question.

IT IS SO ORDERED this 5th day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON, an individual,

Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; et al.,

Defendants.

No. 92-C-1032-BU

ORDER

This matter now comes before the Court upon Plaintiff's Motion for Review of Taxation of Costs (Docket Entry #360). On May 26, 1995, the Court granted the motion for summary judgment of Defendants and denied the motion for partial summary judgment of Plaintiff. A written order setting forth the Court's reasons for its decision and a final judgment were entered on June 19, 1995. On September 14, 1995, the Clerk of the Court taxed costs against Plaintiff in the amount of $138,700.24. Plaintiff seeks review of these costs pursuant to Fed.R.Civ.P. 54(d) and Local Rule 54(e).

First, Plaintiff challenges the award of $54,009.84 for deposition transcripts, reporter fees and witness and travel fees for certain deponents. The Court has discretion to tax these costs upon finding that the depositions were necessarily obtained for use in the case. Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983). The Court views the reasonable necessity of such costs "in the light of facts known to counsel at the time [the deposition] was taken.'" Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087,

1099 (5th Cir. 1982), modified on other grounds, 701 F.2d 542 (5th Cir. 1983) en banc.

Upon review, the Court is satisfied that the depositions which were cited in or submitted with the parties' briefs in regard to the summary judgment motions were necessarily obtained for use in this case. Although the Court did not expressly cite to each and every deposition in its written order, the Court considered all of the depositions submitted in determining whether summary judgment in favor of Defendants was appropriate. The Court finds that the taxation of the costs incurred for the stenographic transcripts of these depositions and the witness and travel fees of the deponents was proper.[1]

In addition to the stenographic transcript charges for the depositions cited to or submitted with the parties' briefs in regard to the summary judgment motions, Plaintiff challenges costs taxed for the taking of the videotape depositions of Bruce Grabow, Michael Harbison, Kathryn Ingley, Maggie Kinney, Doug McLeod, Marte Tilton and Robert Tilton. Plaintiff contends that he should not be required to pay costs associated with both stenographic transcripts

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[1]In his motion, Plaintiff objects to deposition expenses for individuals who were deposed by Defendant regarding issues which were the subject of Defendants' four-month investigation of Plaintiff. Plaintiff maintains that recovery of these expenses should be denied since Defendants already had the relevant information in their possession as to those issues. This Court disagrees. Although Defendants did engage in an investigation prior to the broadcasts, the Court finds that Defendants were entitled to take depositions to obtain evidence in a form admissible in court. In addition, the Court finds that Defendants were entitled to obtain further corroborating evidence to establish the substantial truth of their broadcasts.

and videotapes of the depositions. Having reviewed the applicable authorities, the Court finds that the reasoning of Meredith v. Schreiner Transport, Inc., 814 F. Supp. 1004 (D. Kan. 1993), is sound. The Court therefore concludes that the expenses of these videotape depositions are recoverable.

As to the remaining depositions which were not cited in or submitted with the parties' briefs, the Court concludes that the depositions were necessarily obtained for use in the case. The Court finds that these depositions were not taken simply for investigative purposes or for the convenience of counsel as argued by Plaintiff. Moreover, the Court finds that these depositions were relevant to the issues in this case. The Court therefore finds that the costs for these depositions were properly taxed.[2]

Second, Plaintiff challenges the award of $82,790.40 as costs of exemplification and copies. Upon review, the Court finds that Defendants are entitled to recover all of the costs of exemplification and copies taxed by the Court Clerk except for the rush charges in the amount of $2,879.90. The Court concludes that

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[2]Plaintiff, in his motion, argues that if the Court determines that a deposition expense should be taxed as costs against Plaintiff, the Court should review each deposition and require Plaintiff to pay for only that part of the deposition that is relevant to a libel alleged by Plaintiff. The Court disagrees. Since at least some of the portions of each deposition should have been transcribed as they were necessary for the litigation of this case, it was not unreasonable for Defendants to have the entirety of each deposition transcribed without distinction between the relevant and alleged irrelevant portions of the deposition. The Court declines to impose upon the court reporter and Defendants the burden of deciding and designating which portions of a deposition should be transcribed and which should not be, when ordering a transcript.

the costs of copying trial exhibits and Rule 45 documents as well as the costs of imaging documents in the Internal Data Management warehouse were necessarily incurred by Defendants.

As to the costs taxed for trial exhibits, the Court finds that those costs were necessarily incurred by Defendants as the Court had ordered Defendants to provide a set of trial exhibits to Plaintiff and to the Court. Although Plaintiff states that the Court did not advise Defendants in advance that Plaintiff would pay for those exhibits, Plaintiff was clearly on notice under section 1920 that the prevailing party would be entitled to recover costs, including costs for trial exhibits.

In regard to the rush charges, the Court finds that such charges do not fall within the category of exemplification or copies costs nor any other category of recoverable costs. The Court also concludes that the charges were not reasonably incurred.

Finally, Plaintiff challenges Defendants' recovery of $1,900.00 for interpreter fees incurred in connection with the depositions of Daniel Dayanandhan and Hugo Morales. The Court finds that Defendants are entitled to recover the interpreter and translation fees. The Court finds that the deposition testimony of Hugo Morales and Daniel Dayanandhan was necessarily obtained for use in this case.

Based upon the foregoing, Plaintiff's Motion for Review of Taxation of Costs (Docket Entry #360) is hereby GRANTED in part and DENIED in part. The costs taxed by the Clerk of the Court are

hereby REDUCED by $2,879.90; making the total amount of costs taxed $135,830.31.

ENTERED this 5th day of January, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MERRILL DAVID KRAMER,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a New York corporation, and LOUIS HIGGINS,

Defendants.

Case No. 95-C-261-BU

JUDGMENT

This action came before the Court upon the Motion for Summary Judgment and the Amended Motion for Summary Judgment filed by Defendant, Sears, Roebuck and Co., and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, Sears, Roebuck and Co., a New York corporation, and against Plaintiff, Merrill David Kramer, and that Defendant, Sears, Roebuck and Co., a New York corporation, shall recover of Plaintiff, Merrill David Kramer, its costs of action.

Dated at Tulsa, Oklahoma, this 5th day of January, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MERRILL DAVID KRAMER,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a New York corporation, and LOUIS HIGGINS,

Defendants.

Case No. 95-C-261-BU

ORDER

This matter comes before the Court upon the Motion for Summary Judgment and Amended Motion for Summary Judgment filed by Defendant, Sears, Roebuck and Co. ("Sears"). Based upon the parties' submissions and the following uncontroverted facts, the Court makes its determination.

1. Plaintiff, Merrill David Kramer ("Kramer"), was hired by Sears in 1971 and transferred to the Sears' store located in Woodland Hills Mall in 1987 ("Woodland Hills Store"). At the time of the transfer, Kramer held the title of Visual Merchandising Manager and at the beginning of 1990, held the title of Assistant Facilities Manager.

2. While employed at the Woodland Hills Store, Kramer reported directly to the store manager. In approximately March of 1992, Mr. Louis Higgins became the store manager.

3. Mr. Higgins had previously been the District General Manager over twenty-one Dallas area Sears' stores. Because of an internal reorganization of Sears, Mr. Higgins was given the option to take early retirement or to return to managing a single store.

Rather than retiring, Mr. Higgins accepted the job of store manager at the Woodland Hills Store.

4. During the period of Mr. Higgins' supervision of Kramer, the Woodland Hills Store conducted a major remodeling of its physical premises. Once that remodel was completed, the Woodland Hills Store would be a "model store" which would be toured by, as an example to, managers from other Sears' stores. As Assistant Facilities Manager, Kramer supervised that remodel.

5. The remodel was not the first remodel that Kramer had supervised. Kramer had supervised two other major remodels at the Woodland Hills Store.

6. On August 26, 1992, Kramer worked his last day at Sears and had his last contact with Mr. Higgins.

7. On August 24, 1994, Kramer filed the instant lawsuit. In his complaint, Kramer seeks damages from Sears under a claim of intentional infliction of emotional distress. The claim is premised upon the following described conduct of Mr. Higgins which occurred from March or April 1992 until August 26, 1992.[1]

8. On two occasions in mid-summer of 1992, Mr. Higgins walked up and slapped Kramer on the back. One of these slaps left a red mark on Kramer's back for a day or two. After the second time, Kramer asked Mr. Higgins not to slap him on the back again because

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[1]In his complaint, Kramer has alleged a claim of intentional infliction of emotional distress against Mr. Louis Higgins. Kramer also has alleged a claim for interference with his employment contract. On August 9, 1995, this Court sustained Mr. Higgins' Motion to Quash for Insufficient Process. Mr. Higgins is therefore not a party to this lawsuit.

it caused him pain. Mr. Higgins did not slap Kramer again.

9. A couple of times during the summer, Mr. Higgins dropped a board or some other large item behind Kramer which would make a loud noise and startle him.

10. On two occasions, Mr. Higgins paged Kramer which required him to stop whatever project he was working on, clean up his area and then report to Mr. Higgins at another location within the store. The purpose for one of those pagings was for Kramer to pick up a piece of paper on the floor and the other paging was for the purpose of tightening a loose screw in a door rail.

11. On three occasions, Mr. Higgins threatened to fire Kramer.

12. Regarding the first occasion, Mr. Higgins approached Kramer and stated that if they were to get audited, Kramer would be fired because he, Mr. Higgins, had signed a voucher to pay a carpenter which was prohibited by Sears' policy. Mr. Higgins stated that if he were fired, Plaintiff would be fired too.

13. The second occasion occurred in June or July of 1992. Kramer had previously scheduled two weeks of vacation for June or July 1992. Shortly before the scheduled vacation, Mr. Higgins told Kramer that he could not take the two weeks off. Kramer indicated that he knew he could not take the two weeks off but wanted to take a few days off to be with his children. Mr. Higgins walked away. The next day he called Kramer into the office and told him that he assumed from the earlier conversation that Kramer could not handle his job and suggested that Kramer look for another job. Kramer

told Mr. Higgins he would finish the job if it killed him. Mr. Higgins told Kramer to leave his office. Later that day, Mr. Higgins called Kramer back into his office and told him he could take a few days off to be with his family.

14. The third threat of termination related to an invoice for installation of carpet during the remodel. The invoice was excessive and did not detail at what rates Sears was paying the carpet installers. When Mr. Higgins questioned Kramer about the invoice, Kramer stated that he did not know what they were charging and stated that the carpet installers would not tell him what they were charging. Mr. Higgins found that to be an unacceptable answer.

15. At a staff meeting, shortly after Mr. Higgins arrived as store manager, Mr. Higgins asked Kramer a question about his budget and Kramer told Mr. Higgins that he was unable to get that information because the previous store manager had always taken care of it. After the meeting, Kramer remained in the room with Mr. Higgins. Mr. Higgins yelled at Kramer and pounded on the desk because Kramer did not know how to retrieve a report from the computer. Kramer told Mr. Higgins that the previous manager had never showed him how to retrieve the report, at which time Mr. Higgins told Kramer to get out.

16. Mr. Higgins kept Kramer on the staff schedule during the remodel. This resulted in Kramer having to close the Woodland Hills Store on certain nights. As a result, Kramer would not leave work until 10:30 p.m. or 11:00 p.m. He would then have to return

to work at 6:00 a.m. to meet with the contractors for the remodeling. Although Kramer requested to be taken off the staff schedule because of the amount of hours he was required to work, such request was denied.

17. When Kramer came to the store on his days off, Mr. Higgins required him to undertake work assignments which kept Kramer in the store for as long as five hours.

18. Kramer was also required to do additional projects which were unrelated to the remodel. Such instances included obtaining measurements and costs to tint certain windows in the store and determining the costs of doors and a bumper for the dock.

19. On one occasion, Kramer advised Mr. Higgins that certain walls were going to be torn down in the Woodland Hills Store and that an electrical permit would be necessary to get an electrician into the store to shut off the power. Mr. Higgins told Kramer to forget about it and that he would take care of it. Later, the electrical inspector arrived at the store and became upset when he saw the exposed electrical wires. Despite Kramer's request, Mr. Higgins refused to meet with the electrical inspector. Instead, he directed Kramer to meet with the electrical inspector since he was the head of the remodeling. The electrical contractor directed Kramer to immediately obtain an electrical contractor and cautioned him about complying with city codes in the future.

20. Mr. Higgins conducted a two-day company team building meeting in June 1992, for all staff members, including Kramer. The staff members were taught a procedure called "time out" whereby an

employee could approach a manager about a problem and say "time out." The employee and manager could then discuss the problem and nothing would be held against the employee. Sometime after the meeting, Kramer approached Mr. Higgins about a problem. Mr. Higgins began arguing with Kramer and Kramer said "time out." Mr. Higgins told Kramer that the procedure did not apply to him.

21. Kramer supervised the movement of the entire jewelry department which involved moving and adding jewelry cases and taking up and putting down carpet. Once the project was completed, Kramer asked Mr. Higgins if he liked the job. While reviewing the job, Mr. Higgins found a strip of carpet approximately 1 foot long and 2 inches wide sticking out from underneath a jewelry case into the aisle. According to Plaintiff, Mr. Higgins began ranting and raving about that piece of carpet.

22. Mr. Higgins carried a tape recorder and told Kramer and another Sears' employee on one occasion that he recorded people's conversations.

23. The last three weeks of the remodeling, Kramer was required to work seventeen days straight. Several of the days, Kramer worked overnight or into the wee hours of the morning.

24. On August 25, 1992, the night before the remodeling was finished, Sears' Regional Manager hosted a banquet for the visual display personnel. Prior to the banquet, Mr. Higgins assigned Kramer extra work. Kramer had to stay to finish the work. When an employee in tears begged Kramer to go to the banquet, he complied. He then returned to the store and worked until midnight or one

o'clock.

In its motions, Sears contends that Kramer's claim of intentional infliction of emotional distress is barred by the two-year statute of limitations set forth in Okla. Stat. tit. 12, § 95(3).[2] Sears asserts that according to the undisputed evidence, Kramer's last day of work and last contact with Mr. Higgins was August 26, 1992. Kramer's complaint against Sears was filed on August 24, 1994, one year and 363 days after Kramer's last day of work. Because Kramer is prohibited under section 95(3) from bringing any claim based upon operative events that took place prior to August 24, 1992 and there are no operative events which occurred on or after August 24, 1992, Sears contends that Kramer's action is clearly barred by the statute of limitations.

However, even if Kramer's claim were not barred by the applicable statute of limitations, Sears argues that summary judgment is appropriate as there are insufficient facts to support Kramer's claim. Sears specifically contends that the harassing conduct complained of by Kramer does not reach the level of "extreme and outrageous." According to Sears, none of the conduct alleged by Kramer could conceivably be regarded as "utterly

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[2]Section 95(3) provides in pertinent part:

> Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> 3. Within two (2) years: . . . an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated
> . . . .

intolerable in a civilized community" or "beyond all possible bounds of decency" which is required under Oklahoma law to support a claim for intentional infliction of emotional distress. Consequently, Sears contends that it cannot, as a matter of law, be held liable for Kramer's claim.

Kramer, in response, argues that the two-year statute of limitations was tolled until September 16, 1992 by virtue of Oklahoma's "discovery rule." Kramer asserts that he did not become aware of or discover the nature and cause of his injuries until after his hospitalization, which occurred on September 16, 1992. Since his action was brought within two years of the time he discovered the existence and the nature of his injury, Kramer argues that his action is timely. In addition, Kramer argues that his action is timely as his action did not accrue under the "continuing tort doctrine" until the last act of tortious conduct on the part of Mr. Higgins occurred. According to Kramer, the last tortious act occurred on August 26, 1992. Because this lawsuit was filed within two years of the last tortious act by Mr. Higgins, Kramer argues that his intentional infliction of emotional distress claim is not barred under section 95(3).

Furthermore, Kramer contends that the actions of Mr. Higgins were sufficiently "extreme and outrageous" to support a claim of intentional infliction of emotional distress. Kramer asserts that in determining whether the conduct of Mr. Higgins was outrageous, the Court must examine the entire course of behavior by Mr. Higgins from March and April of 1992 to August of 1992 rather than each

individual act. According to Kramer, the acts taken as a whole clearly show outrageous conduct. Kramer also contends that in reaching its decision, the Court must examine the office environment where the tortious acts occurred and the specific relationship between Mr. Higgins and Kramer, i.e. supervisor and employee. These factors, Kramer argues, support a finding that the tortious acts of Mr. Higgins were extreme and outrageous.

In reply, Sears contends that the discovery rule does not apply to this action and that the continuous tort doctrine has been previously rejected by this Court. Sears also argues that the conduct alleged by Plaintiff to be actionable does not rise to the level of the tort of intentional infliction of emotional distress. Sears therefore contends that summary judgment is appropriate on the basis of this action is time-barred and/or the alleged tortious conduct does not rise to the level of an actionable tort under Oklahoma law.

Upon review, the Court finds that Kramer's action, to the extent it seeks recovery based upon conduct prior to August 24, 1992, is time-barred. The applicable statute of limitations for Kramer's action is two years. Okla. Stat. tit. 12, § 95(3). The evidence shows that the challenged conduct of Mr. Higgins occurred from March or April, 1992 to August 25, 1992. The instant lawsuit, however, was not filed until August 24, 1994. Consequently, Kramer is precluded from seeking any recovery for damages for conduct prior to August 24, 1992.

The Court finds that the Oklahoma discovery rule has no

application to this case.[3] An essential prerequisite to the discovery rule's application is a plaintiff's lack of awareness in recognizing the cause and extent of emotional harm. Lovelace v. Keohane, 831 P.2d 624, 630 (Okla. 1992). In this case, the evidence reveals that Kramer cannot satisfy the minimum requirement to invoke the discovery rule. The discovery rule has no application when a plaintiff is chargeable with facts which he ought to have discovered in the exercise of reasonable diligence. Id. In Daugherty v. Farmers Cooperative Ass'n, 689 P.2d 947 (Okla. 1984), the Oklahoma Supreme Court stated:

> Properly limited, a discovery rule should encompass the precept that acquisition of sufficient information which, if pursued, would lead to the true condition of things will be held as sufficient knowledge to start the running of the statute of limitations. This rule obtains because a reasonably prudent person is required to pursue his claim with diligence.
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> * * *
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> 'For purposes of the statute of limitations, if the means of knowledge exist and the circumstances are such as to put a reasonable man upon inquiry, it will be held that there was knowledge of what could have been readily ascertained by such inquiry and the limitation on the general rule often expressed in the statute is that plaintiff cannot successfully . . .[set up a bar to the running of the statute] if his failure to discover it is attributable to his own negligence.'

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[3]The Oklahoma discovery rule tolls the statute of limitations until an injured party knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury, and resulting cause of action. St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 782 P.2d 915, 920 n. 1 (Okla. 1989).

Id. at 950-951 (citations omitted).

The evidence shows that Kramer was well aware of the challenged conduct of Mr. Higgins and of the emotional and physical harm to himself prior to August 24, 1992. While Kramer may not have known what in fact was the cause of the harm to him, Kramer is chargeable with the knowledge of the fact that he was in some way injured. Kramer had an obligation and reasonable opportunity to discover with due diligence the actual cause of the harm inflicted upon him. As a result, Kramer may not invoke the discovery rule. Id.

As to the continuing tort doctrine, the Court opines that it should follow the Court's approach in Marshall v. Nelson Electric, A Unit of General Signal, 766 F. Supp. 1018 (N.D. Okla. 1991). In the Court's view, the Court's reasoning in Marshall is sound. Thus, the Court must determine whether there was sufficiently extreme and outrageous conduct which occurred within the statute of limitations period. If there was such conduct, Kramer may assert his claim as to all challenged conduct of Mr. Higgins. Otherwise, he may not.

The tort of intentional infliction of emotional distress, also known as the tort of outrage, is governed by the narrow standards of section 46 of the Restatement (Second) of Torts (1965), which provides in pertinent part:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Liability for the tort of outrage does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind . . ." Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986)(quoting comment d of section 46). "Conduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be 'regarded as utterly intolerable in a civilized community,' falls short of having actionable quality. Hurt feelings do not make a cause of action under the tort of outrage rubric." Id.

In the instant case, the only conduct which Kramer has alleged occurred within the applicable period is Mr. Higgins' assignment of extra work to Kramer on August 25, 1992, which required Kramer to choose between staying at work and missing a banquet for Sears' visual display personnel or going to the dinner and working overnight to finish the work. Clearly, under Oklahoma law, this conduct was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Although the conduct may have been inconsiderate and unkind, it cannot be considered as beyond all possible bounds of decency. Thus, as no extreme and outrageous occurred within the statute of limitations, Kramer may not rely upon the continuing tort doctrine to revive the time-barred conduct. Kramer's action based upon conduct prior to August

24, 1992 is barred by the two-year statute of limitations.[4]

Even if the Court were to find that the instant action was timely filed as to all challenged conduct, the Court concludes that Defendant is still entitled to summary judgment.[5] Viewing the evidence and reasonable inferences therefrom in a light most favorable to Kramer, the Court finds that a reasonable person could not find that the challenged conduct of Mr. Higgins was so offensive as to go "beyond all possible bounds of decency," and to be "regarded as utterly intolerable in a civilized community." Moreover, the Court finds that this action is not one in which the recitation of the facts to an average member of the community would arouse his resentment against Mr. Higgins, and lead him to exclaim, "Outrageous." Comment d of § 46, Restatement (Second) of Torts (1965).

The Court finds that the conduct of which Kramer complains is similar to the conduct alleged in Eddy which the Oklahoma Supreme Court found to be non-actionable. In Eddy, the plaintiff specifically complained that his employer did not efficiently handle his workers' compensation claim; that it was negatively

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[4]Although the challenged conduct of Mr. Higgins on the night of August 25, 1992 is not time-barred, the Court finds that Kramer's action as to this conduct fails, as matter of law, as the conduct is not sufficiently extreme and outrageous.

[5]Under Oklahoma law, it is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the section 46 standards. Only when it is found that reasonable men would differ in an assessment of this critical issue may the tort of outrage be submitted to the jury. Breeden v. League Services Corp., 575 P.2d 1374, 1377 (Okla. 1978)

disposed towards him due to a complaint filed with the National Labor Relations Board; that his employer turned down his claim of payment for his accrued 1979 vacation which he requested in lieu of taking off work; that it refused him vacation time after he returned to work following sick leave; that his supervisor and foreman ridiculed him for his diligent efforts as a union steward in collecting a large number of grievances, although the two men did concede he was correct as to 90% of these grievances; that he was told that, although he was overqualified for his job, he would never advance; that he was requested to rewrite the training manual without compensation; that a reassignment to train other employees, coupled with his removal from the graveyard shift, resulted in a reduction of his pay; that his employer required him to submit to a hearing test although he had taken the test two months earlier; that his foreman ridiculed him when he missed the test requirements on a project; that the foreman rejected his idea for certain improvements and yet tried the very idea three more times without giving him credit; that his supervisor and foreman harassed him about medical certificates which were needed because the employer would not honor a differing diagnosis by his chiropractor; that his supervisor and foreman mimicked and ridiculed him behind his back after directing him to read a safety bulletin aloud to his co-workers when they knew his speech was impaired by post-surgery medication; and that his foreman commented that he had done a stupid thing when, in an effort to stop a kitchen blender, he stuck his hand between its blades and received severe cuts. Although

Kramer contends that the setting of an oil refinery in Eddy distinguishes Eddy from this case, the Court concludes otherwise. While the alleged conduct in this case occurred in a modern department store as opposed to an oil refinery, it occurred during a major remodel of a Sears' store. Considering the pressures involved with the remodel, the alleged conduct cannot be considered as meeting the narrow standards of section 46.

Kramer, in support of his claim, relies upon the Tenth Circuit's decision in Snider v. Circle K Corp., 923 F.2d 1404 (10th Cir. 1991). However, the Court finds that such decision does not dictate submission of Kramer's claim to the jury. In Snider, the trial court submitted the issue to the jury and the jury rendered a verdict against Defendants. Defendants appealed the verdict claiming that there was insufficient evidence at trial to have submitted that issue to the jury. Due to the case's procedural posture, the Tenth Circuit was required to review the trial court's ruling under an abuse of discretion standard. This Court is not convinced that had the Tenth Circuit reviewed the matter under a de novo standard as required for a motion for summary judgment, the same decision would have resulted. In any event, the Court concludes that the circumstances in Snider are sufficiently different from the instant case.

Comparing the alleged conduct in Eddy, Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379 (10th Cir. 1991) and Merrick v. Northern Natural Gas Co., 911 F.2d 426, 432 (10th Cir. 1990), which was found non-actionable, with the conduct complained of in this

case, the Court concludes that the complained-of conduct does not give rise to liability under a claim of intentional infliction of emotional distress.

Based upon the foregoing, Defendant, Sears, Roebuck and Co.'s Motion for Summary Judgment (Docket Entry #22) and Defendant, Sears, Roebuck and Co.'s Amended Motion for Summary Judgment (Docket Entry #42) are GRANTED. Judgment shall issue forthwith. In light of the Court's ruling, Plaintiff, Merrill David Kramer's Motion is Limine (Docket Entry #43) is declared MOOT, Defendant, Sears, Roebuck and Co.'s Motion to Amend Witness List (Docket Entry #54) is declared MOOT and Defendant's Application to Extend Deadline for Defendant's Expert Compliance and Deposition of Defendant's Expert is declared MOOT.

ENTERED this 5th day of January, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLARK E. CHAMBERS,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 94-C-1013-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended. On September 25, 1995, plaintiff's counsel filed a suggestion of death upon the record, stating that plaintiff had died on March 12, 1995. On the same date, he filed a motion to substitute parties (Docket #12)[2], asking that plaintiff's sister, Beth Burgan, be substituted as plaintiff in this action.

Defendant filed a motion to dismiss based on lack of standing (Docket #14) on October 10, 1995. Defendant claims that plaintiff has not met the requirements of Fed.R.Civ.P. 25(a)(1), which pertains to proper substitution of parties, and has not set

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[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2]"Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma does not apply in his case.

forth authorities which would demonstrate that the substitution has been presented "in a professionally responsible fashion."

Defendant argues that, under Fed.R.Civ.P. 25, the successor of a deceased plaintiff has the duty to present evidence which demonstrates that a claim for Social Security disability benefits is not extinguished by the death. Rule 25(a)(1) provides as follows:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

It is clear that a suggestion of death on the record must be served on parties and non-parties in accordance with Federal Rules of Civil Procedure 4 and 5 under this statute. Grandbouche v. Lovell, 913 F.2d 835, 836-37 (10th Cir. 1990). "Successors or representatives of the deceased party" are those empowered to assert any legal claims of the decedent not extinguished by death, and personal service alerts them of the consequences of death for a pending suit and signals the need for action to preserve the claim. Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 (4th Cir. 1985). The decedent's attorney's agency to act ceases with the death of his client, and he has no power to continue an action on his own initiative. Id. He is not a party and is not a "representative of the deceased party" in the sense contemplated by Rule 25(a)(1) and may not move for substitution. Id.

Defendant contends that counsel for the deceased has not properly served a

"suggestion of death on the record" as required by Rules 4, 5 and 25(a)(1), has not properly served a motion for substitution as similarly required, has not shown that he has been hired to represent the proper substituted party in making a claim for the deceased plaintiff's Social Security benefits, and has not shown who the proper substituted party would be under the Commissioner's regulations and the federal rules.

Defendant argues that plaintiff's attorney has not shown that plaintiff's sister is the living person in highest order of priority to receive the deceased's benefits or the legal representative of the estate under the Social Security Act. 20 C.F.R. § 404.503(b) and (d).

On November 13, 1995, plaintiff's counsel filed a Brief in Opposition to Defendant's Motion to Dismiss (Docket #19). He attached an Affidavit from plaintiff's sister, Beth Burgan, stating that the plaintiff died, was not married at the time of his death, did not have any children or parents surviving him, and was survived by three brothers and three sisters. Counsel also stated in an affidavit that he had been employed by Beth Burgan to continue this action and had sent the Motion to Substitute Parties, the Suggestion of Death, the Affidavit of Beth Burgan, and his Response Brief, by Certified Mail, Return Receipt Requested, to Shirley S. Chater, Commissioner of the Social Security Administration, Steve Lewis, United States Attorney, Northern District of Oklahoma, and Janet Reno, United States Attorney General.

Plaintiff's counsel asks the court to substitute plaintiff's sister, Beth Burgan, as plaintiff in this case or in the alternative, to substitute all plaintiff's surviving sisters, Beth Burgan, Geneva Lance, and Barbara Porter, and his surviving brothers, James Chambers, Ronald Chambers, and Phillip Chambers, as plaintiffs in this action. Counsel states that

plaintiff does not have an estate and, at the time of his death, had no income or assets, such as real estate, a motor vehicle, or a bank account. He lived with his sister, Beth Burgan, rent free and received food stamps of $115.00 per month, according to his Affidavit of Financial Status filed on October 28, 1994 (Docket #3).

These facts show that there are no living relatives listed in 23 C.F.R. § 404.503(b) who may receive the plaintiff's social security benefits if this court renders a favorable decision. The plaintiff died without surviving children, his parents are deceased, and he did not have a surviving spouse. Therefore, under 20 C.F.R. § 404.503(b)(7), claimant's legal representative is a proper person to accept the benefits. A legal representative is defined in 20 C.F.R. § 404.503(d) as follows:

> The term "legal representative," for the purpose of qualifying to receive an underpayment, generally means the administrator or executor of the estate of the deceased individual. However, it may also include an individual, institution or organization acting on behalf of an unadministered estate, provided that such person can give the Administration good acquittance. . . . The following persons may qualify as legal representative for the purposes of this subpart, provided they can give the Administration good acquittance:
>
> (1) A person who qualifies under a State's small estate statute,
> . . .
>
> (e) Definition of "good acquittance." A person is considered to give the Administration "good acquittance" when payment to that person will release the Administration from further liability for such payment . . . .

Under Oklahoma law, an estate under $60,000.00 qualifies for a summary administration instead of a full probate procedure pursuant to Okla. Stat. tit. 58, § 241. In this case, plaintiff had an estate of no value. Counsel asks that plaintiff's survivors, his sisters and brothers, be substituted as plaintiffs in this action, because they qualify under the Oklahoma small estate statute and can give the Social Security Administration good

acquittance and file a probate action to collect benefits if a favorable decision is rendered.

The Motion to Substitute Parties (Docket #12) is granted and the Motion to Dismiss for Lack of Standing (Docket #14) is denied. All of plaintiff's surviving brothers and sisters, James Chambers, Ronald Chambers, Phillip Chambers, Beth Burgan, Geneva Lance, and Barbara Porter, are substituted as plaintiffs in this case. It is clear that deceased's counsel has now complied with Fed.R.Civ.P. 25 (a)(1).

The procedural background of plaintiff's application for benefits was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[3]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[4] He found that claimant had the residual functional capacity to

---

[3] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[4] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

perform work of a medium nature, with the further limitations of a fifty percent grip strength limitation and balance and coordination problems and a need to avoid heights and moving machinery. He concluded that claimant was unable to perform his past relevant work as a blueprint machine operator, draftsman trainee, automobile porter, laborer, and maintenance repairman, but that he had the residual functional capacity to perform work of a medium nature not requiring exposure to heights, operating an automobile, or moving machinery. He noted that claimant was 40 years old, which is defined as a younger individual, had a high school education with 2 years of college training, and had previously performed work of a semiskilled nature, so the issue of transferability of work skills was not material. Having determined that claimant's impairments did not prevent him from performing certain jobs in the national economy, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ's decision is not supported by substantial evidence, because no evidence was presented to meet the Secretary's burden of proving claimant could perform medium work.

(2) The ALJ improperly rejected or ignored evidence supporting claimant on the issue of his ability to perform prolonged standing/walking.

(3) The ALJ improperly relied on the absence of contrary medical evidence in discrediting claimant's subjective complaints of blurred vision and impaired concentration.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant alleges disability from February 15, 1988, due to back problems and epilepsy. (TR 23). He suffered a seizure at work on that date (TR 39, 54). The medical evidence reveals claimant has been diagnosed with a seizure disorder; however, his seizures have been controlled by medications. (TR 155-181). Claimant testified the rate of seizure occurrence is approximately once per year. (TR 53). Based upon these findings, the ALJ found that claimant's seizure disorder failed to meet the requirements necessary for a finding of total disability as outlined in sections 11.02 or 11.03, Appendix 1, Subpart P, Regulations No. 4. (TR 20-21).

As a result of a fall from a two-story platform on January 19, 1989, claimant was diagnosed with a vertebral fracture and multiple contusions of the ribs, shoulder, and skull. (TR 143). Claimant enrolled in the Re/Flex Center Work Hardening Program for the period of July 24, 1989, through September 8, 1989. (TR 182). Dr. Martin E. Scott, claimant's treating physician, monitored his patient's progress in the program and reported moderate progressive improvement. (TR 182). Claimant was found to be generally stable at a September 5, 1989 assessment as he was scoring in the medium physical demand level consistently with lifting 50 pounds infrequently and 25 pounds frequently. (TR 182). His hand grips were fifty percent under the normal for his age group and his performance was further limited by general balance and coordination problems related to his basic neurological status. (TR 182). At that time, claimant was released for return to work, but the doctor stated that he would not improve markedly and he therefore had a permanent partial disability allowing maximum performance only to the medium performance level. (TR 183).

On January 10, 1990, claimant was examined by Dr. Jim Martin for the purpose of an impairment rating. (TR 312). During the examination, claimant complained of constant achiness and stiffness over the posterior neck and lower back. (TR 312). The physical examination revealed muscle spasm and tenderness over the low posterior cervical muscles bilaterally and exquisite tenderness and spasm over the trapezius muscles bilaterally. (TR 313). The claimant had a restricted range of motion of the cervical spine, but grip strength appeared adequate and equal and sensory and motor abilities appeared to be intact. (TR 313). An examination of the low back revealed muscle spasms and tenderness from L1 to S1 bilaterally and restricted range of motion of the lumbar spine. (TR 313). Straight-leg-raising was positive bilaterally at 60 degrees, deep tendon reflexes were normal and equal, and sensory and motor abilities appeared intact. (TR 314). The diagnostic impression was a compression fracture at L4 with chronic musculoligamentous injury to the posterior neck and low back. (TR 314). Dr. Martin recommended that the claimant not return to the work force in the capacity of a manual laborer, but continue to study drafting and design and find "a more sedentary type of employment" (TR 314).

On the basis of the foregoing medical evidence, the ALJ determined that claimant did not have an impairment or combination of impairments listed in or medically equal to an impairment listed in Section 1.05C Appendix 1, Subpart P, Regulations No. 4. (TR 20). In support of this finding, the ALJ reiterated that although claimant had been diagnosed as having a compression fracture at L4 and a chronic musculoligamentous injury to the posterior neck and low back, there was no evidence of sensory loss, reflex change, weakness, or atrophy of either the upper or lower extremities. (TR 20).

Claimant testified that he takes Tylenol and exercises. (TR 48-49, 54). His daily activities include watching television, cooking his meals, and light housework. (TR 44). Other activities include drawing, reading, mowing the lawn, occasional bowling, and feeding and watering three dogs. (TR 44-47). No medical evidence establishes the existence of permanent disabling pain. In assessing claimant's subjective complaints, the ALJ observed the factors discussed in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Upon evaluation of claimant's signs and symptoms the ALJ concluded that the nature, duration, frequency and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness and side effects of the medication taken for relief of pain; the claimant's functional restrictions; and the combined impact on the claimant's daily activities did not support a finding of totally disabling pain syndrome according to the criteria established in 20 C.F.R. § 404.152(g) as interpreted by Social Security Ruling 88-13. (TR 21).

There is no merit to claimant's contention that there is no specific medical evidence to prove he can stand for six hours out of an eight-hour day, as required to perform medium work. Medical evidence from both claimant's treating physicians, the government's medical consultant, and the vocational expert provides substantial evidence to support the ALJ's determination. Dr. Scott released him for return to work and indicated his maximum performance as being in the medium performance level. (TR 183). Dr. Martin expressed hope that he could do sedentary work (TR 314). In addition, a residual physical functional capacity assessment done on December 4, 1992 found that claimant could stand and/or walk (with normal breaks) for a total of about six hours in an eight hour workday. (TR

77-78). The ALJ included claimant's ability to do sedentary, light, or medium work and his balance and coordination problem in his hypothetical questions to the vocational expert, and the expert concluded that there were many jobs that he could perform (TR 64-67). The record provides substantial evidence to support a finding that claimant meets the standing requirement for medium work.

In his final proposition of error, claimant contends that the ALJ improperly relied on the absence of contrary evidence to discredit his complaints of blurred vision and impaired concentration associated with his seizure medication. (TR 57-59). The only medical records concerning this issue involved a treating physician's record dated 2/4/93 of his patient's complaint of "mild blurring of vision, and unsteady gait," with an increased dosage of Dilantin (TR 201). A Dilantin level lab test was ordered, and when the results were obtained on 2/10/93 showing elevated levels, the 100 mg dose previously prescribed was adjusted to 50 mg on 2/22/93 (TR 197-98). The records strongly suggest that the alleged "vision impairment" was transitory, and related to the higher dosage of Dilantin. There are no medical records that indicate continuing problems with blurred vision after the Dilantin level was adjusted. Claimant admitted that the blurred vision was a side effect of the Dilantin (TR 59). The record does not support any organic etiology for the blurred vision complaint. In fact, the earlier residual functional capacity assessment reported no visual limitations (TR 80).

The ALJ is not required at step five of the sequential evaluative procedure to establish a subjective impairment does not exist. The ALJ's task is to determine whether, despite medically determinable impairments, claimant can still do relevant work. The

statutory language defines "disabled" in this way: "[a]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §1332c(a)(3)(A). The mere recording of a patient's complaint is not a medical determination. The record lacks any mention of, or medical determination of, claimant's alleged impaired concentration.

Claimant cites Beesley v. Department of Health and Human Serv., No. 93-C-0210-E, slip op. at 6-7 (N.D. Okla. 1994), for the proposition that the ALJ cannot simply rely on an absence of evidence to meet the Secretary's burden at step five of the sequential evaluative procedure. In Beesley, however, a medically determinable impairment had already been established, and the ALJ incorrectly relied on the absence of evidence in finding the claimant maintained the residual functional capacity to perform other work. Here, the medically determinable impairments are neither blurred vision nor inability to concentrate. Thus, the denial of benefits was properly turned upon the ALJ's finding that the claimant had the residual functional capacity to perform other work despite his medically determinable impairments of a seizure disorder, a compression fracture at L4, and a chronic musculoligamentous injury of the posterior neck and low back. While claimant's brief correctly states the applicable law, it provides support for the decision by the ALJ to not consider the allegations of blurred vision and impaired concentration in his analysis. "The ALJ is not a medical expert. It is the ALJ's duty . . . not to use his own 'medical expertise' to create a medical opinion where one is absent." (Plaintiff's Memorandum Brief,

Docket #9, pg. 4 (citing Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987))).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 4th day of January, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:chamber

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JOE LEWIS SMITH, SR. aka JOE L. SMITH aka LEWIS J. SMITH aka J.L. SMITH; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED JAN - 5 1996 Richard M. Lawrence, Court Clerk U.S. DISTRICT COURT ENTERED ON DOCKET DATE JAN 08 1996 Civil Case No. 95-CV 886B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of Jan., 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel Kim D. Ashley; and the Defendant, JOE LEWIS SMITH, SR. aka JOE L. SMITH aka LEWIS J. SMITH aka J.L. SMITH, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, JOE LEWIS SMITH, SR. aka JOE L. SMITH aka LEWIS J. SMITH aka J.L. SMITH will hereinafter be referred to as ("JOE LEWIS SMITH, JR."). The Defendant,

JOE LEWIS SMITH, SR., is a single, unmarried person and has remained to since taking title to the property which is the subject matter of this foreclosure action.

The Court being fully advised and having examined the court file finds that the Defendant, JOE LEWIS SMITH SR., acknowledged receipt of Summons and Complaint via certified mail on October 16, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on September 27, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on October 2, 1995; and that the Defendant, JOE LEWIS SMITH, SR., has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Six (6), Block One (1), UNIVERSITY PLACE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on November 6, 1985, William M. Grass, executed and delivered to SOUTHWESTERN MORTGAGE CORPORATION his mortgage note in the amount of $43,050.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, William M. Grass, executed and delivered to SOUTHWESTERN

MORTGAGE CORPORATION a mortgage dated November 6, 1985, covering the above-described property. Said mortgage was recorded on November 7, 1985, in Book 4904, Page 2150, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 6, 1985, Southwestern Mortgage Corporation assigned the above-described mortgage note and mortgage to North Central Financial Corporation. This Assignment of Mortgage was recorded on November 12, 1985, in Book 4905, Page 1649, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 13, 1989, NORTH CENTRAL FINANCIAL CORPORATION nka SHAWMUT MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C.. This Assignment of Mortgage was recorded on April 26, 1986, in Book 5179, Page 2322, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, JOE LEWIS SMITH, SR., is the current title owner of the property by virtue of a General Warranty Deed dated August 16, 1988, and recorded on September 30, 1988 in Book 5131, Page 1695, in the records of Tulsa County, Oklahoma. The Defendant, JOE LEWIS SMITH, SR., is the current assumptor of the subject indebtedness.

The Court further finds that on May 1, 1989, the Defendant, JOE LEWIS SMITH, SR., entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1990.

The Court further finds that on July 29, 1988, the Defendant, JOE LEWIS SMITH, SR. filed his petition for Chapter 7 relief int he Untied States Bankruptcy Court for the Northern District of Oklahoma, case number 88-2239-C, which was discharged on January 17, 1989 and subsequently closed on April 28, 1989. The subject property was not listed in the schedules because the property was acquired by the Defendant after the commencement of the Chapter 7 Bankruptcy.

The Court further finds that the Defendant, JOE LEWIS SMITH, SR., made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, JOE LEWIS SMITH, SR., is indebted to the Plaintiff in the principal sum of $71,112.43, plus interest at the rate of 11.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $19.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $12.00 which became a lien as of June 25, 1993; and a lien in the amount of $12.00 which became a lien as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has a lien on the subject property by virtue of a tax warrant in the amount of $447.85, which became a lien as of February 7, 1981. Said lien is

inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, JOE LEWIS SMITH, SR., is in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, JOE LEWIS SMITH, SR., in the principal sum of $71,112.43, plus interest at the rate of 11.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.35 percent per annum until paid, plus the costs of this action plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $43.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, have and

recover judgment in rem in the amount of $447.85 for a tax warrant, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JOE LEWIS SMITH, SR. and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, JOE LEWIS SMITH, SR., to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of $447.85, plus accrued and accruing interest, for state taxes.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $43.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:
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State of Oklahoma ex rel
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95-CV 886B

LFR/lg

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DANIEL H. FOX and **DEBORAH K. FOX**, husband and wife, Individually and as natural parents of **MICHAEL K. FOX**, a minor, deceased,	)	
Plaintiffs,	)	
vs.	)	Case No.: 94-C-744-K
CITY OF SAND SPRINGS, OKLAHOMA, Municipal Corporation; **TOM LEWALLEN**, Individually and as Chief of Police of Sand Springs, Oklahoma; and **RICHARD ALLEN SAPCUT**,	)	
Defendants.	)	

DISMISSAL BY STIPULATION

COMES NOW the Plaintiffs, Daniel H. Fox and Deborah K. Fox, husband and wife, individually and as natural parents of Michael K. Fox, a minor, deceased ("Plaintiffs"), by and through their attorney of record, S. Michael Watkins, and upon stipulation with Defendants pursuant to Federal Rules of Civil Procedure 41(b) dismiss their claims in this action as follows:

1. All Claims and Causes of Action against Tom Lewallen, individually and in his official capacity as Chief of Police of Sand Springs are dismissed with prejudice.

2. All Claims and Causes of Action against the City of Sand Springs are dismissed with prejudice, except for the State tort wrongful death action against the City of Sand Springs, which is dismissed **without** prejudice.

3. All Claims and Causes of Acition against Richard Allen Sapcut are dismissed with prejudice, except 42 U.S.C. § 1983 claims against Richard Allen Sapcut which are dismissed **without** prejudice.

Dated this _____ day of January, 1996.

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(918) 747-8900

Attorney for Defendants

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(918) 582-9339

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL J. WILDER, PRO SE Appellate, v. OKLAHOMA DEPARTMENT OF SERVICES, Appellee.	)	Case No 95-C-1243-B Okla. Supreme Court No. 86072 District Trial Case No. CJ-94-03950

O R D E R

This matter comes on for consideration, *sua sponte*, of the Appellate's (sic) "NOTICE OF APPEAL" wherein the following appears:

"UNITED STATES DISTRICT COURT
FOR THE TENTH DISTRICT OF
THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL J. WILDER, PRO SE Appellate, v. OKLAHOMA DEPARTMENT OF SERVICES, Appellee.	)	Case No 95-C-1243-B Okla. Supreme Court No. 86072 District Trial Case No. CJ-94-03950

Notice is hereby given that Samuel J. Wilder Appellate, in the above named case, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the final judgment, Dismissing a request for a Judicial review of The Department of Human Services denial of a hearing, concerning the delay of foodstamps in case no. CJ-94-03950 entered in this action on the 26, day of December, 1995.

(6)

(s) Samuel J. Wilder

Samuel J. Wilder Pro Se
225 E. 53rd. Street North
Tulsa, Oklahoma 74126-2656

Pro se litigant Wilder has failed to state this Court's jurisdiction upon which he seeks to bring the instant action and the Court, from the pleadings, can discern none. Accordingly, the matter is subject to dismissal for failure of subject matter jurisdiction.

The Court concludes this matter should be and the same is hereby DISMISSED without prejudice.

IT IS SO ORDERED this 4th day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEVIN WILLIAMS,

Plaintiff,

vs.

RONALD J. CHAMPION,

Defendants.

No. 95-CV-63-B

ORDER

On February 13, 1995, the Court denied Plaintiff's motion for leave to proceed in forma pauperis and granted Plaintiff until March 16, 1995, to submit his $120.00 filing fee. Plaintiff has failed to do so. Accordingly, this action is hereby DISMISSED for failure to pay the filing fee. See Local Rule 5.1(F).

SO ORDERED THIS 4th day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(5)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY ATKINS,)
)
Plaintiff,)
)
vs.) No. 95-CV-484-B
)
HAROLD BERRY,)
)
Defendants.)

ENTERED ON DOCKET
DATE JAN - 5 1996

FILED
JAN 4 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff has failed to notify the Court of his new address for over three months. Accordingly, this action is hereby DISMISSED for lack of prosecution.

SO ORDERED THIS 4th day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(2)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BARTIN PIPE AND PILING SUPPLY, LTD.,	)	
Plaintiff,	)	
vs.	)	No. 94-C-107-H
CHRIS WATSON, RICHARD ERICKSON, JOSEPH RODAKOWSKI, CALVIN THOMAS and PHOENIX SIERRA CO., an Oklahoma partnership,	)	
Defendants.	)	

JUDGMENT BY THE COURT
ON RULE 50 MOTION

This matter comes on this 31st day of October, 1995, upon the motion for judgment as a matter of a law presented by the Plaintiff as to the Defendants Joseph Rodakowski and Phoenix Sierra Co., an Oklahoma partnership. The motion was presented in open court during trial, after Plaintiff and all Defendants rested, the Defendants Joseph Rodakowski and Phoenix Sierra Co., presenting no evidence. The Plaintiff was represented by its attorney Richard L. Carpenter and the Defendants Rodakowski and Phoenix Sierra Co. were represented by their attorney James A. Conrady. The Defendants Rodakowski and Phoenix Sierra Co., in response to the motion and argument raised by Plaintiff, confessed judgment in the amount of $439,681.00, and the Court, being duly advised in the premises, finds that

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judgment should be entered in that amount in favor of the Plaintiff against Defendant Joseph Rodakowski and Phoenix Sierra Co., an Oklahoma general partnership, on the grounds of fraud.

IT IS SO ORDERED.

SVEN ERIK HOLMES, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNIE STUBBLEFIELD,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-992-J

AMENDED JUDGMENT

Pursuant to Fed. R. Civ. P. 60(a) the Court hereby amends the Judgment previously entered in this action to correct a clerical mistake.

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 4 day of January 1996.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BARTIN PIPE AND PILING SUPPLY, LTD.,	)	
Plaintiff,	)	
vs.	)	No. 94-C-107-H
CHRIS WATSON, RICHARD ERICKSON, JOSEPH RODAKOWSKI, CALVIN THOMAS and PHOENIX SIERRA CO., an Oklahoma partnership,	)	
Defendants.	)	

ORDER OF DISMISSAL AS
TO THE DEFENDANT CALVIN THOMAS

This matter comes on for hearing upon the motion of the Defendant Calvin Thomas for dismissal this 31st day of October, 1995. The motion was presented during trial after all parties had rested. All parties stipulate in open court that Calvin Thomas converted a Chapter 11 bankruptcy to a Chapter 7 bankruptcy following the filing of this litigation and included the claims of all parties against him in this litigation in the bankruptcy. All parties stipulate that because of the bankruptcy proceedings, the Defendant Calvin Thomas should be dismissed from this action.

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Upon the agreement and stipulation of all parties, the Defendant Calvin Thomas is hereby dismissed from these proceedings, Defendant Calvin Thomas is to bear his own costs.

IT IS SO ORDERED.

SVEN ERIK HOLMES, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYPERVISION, INC., Plaintiff, vs. DAVID NOSS and MYRIAD TECHNOLOGIES, INC., Defendants MYRIAD TECHNOLOGIES, INC. Third Party Plaintiff, v. JERRY BULLARD AND JIM NOEL, Third Party Defendants.	)	Case No. 94-C 737K

ORDER OF DISMISSAL

Myriad Technologies, Inc. Application to Dismiss with Prejudice Damages Claim Against Hypervision, Inc., and Jerry Bullard being now before the Court, it is hereby ordered that:

Myriad's claim for damages against Hypervision and Bullard is dismissed with prejudice under Fed. R. Civ. P. 41.

Hypervision and Bullard remain subject to this Court's Order of November 1, 1994 enjoining further acts of patent infringement or misappropriation of trade secrets.

This dismissal with prejudice does not affect Myriad's rights to pursue its claim for damages against Third Party Defendant, Jim Noel.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 4 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDITH FOX,

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 92-C-749-BU

ENTERED ON DOCKET
DATE JAN 05 1996

ORDER

Having reviewed the Plaintiff, Judith Fox's Amended Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and having considered the parties' Stipulation for Award of EAJA Fees and Costs, the Court

1. GRANTS Plaintiff's Amended Motion for Attorney Fees Pursuant to the Equal Access to Justice Act (Docket Entry #31); and

2. ORDERS that Defendant shall pay Plaintiff the total amount of $7000.00 for attorney's fees and costs.

ENTERED this 3rd day of January, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES L. BOYD,

Plaintiff,

vs.

CLEETA MEADOWS, and PARKSIDE NURSING HOME,

Defendants.

ENTERED ON DOCKET
DATE JAN - 4 1996

No. 95-C-1229-B

FILED
JAN 03 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER

Plaintiff, a Tulsa county inmate, has filed with the Court a motion for leave to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915, and a civil rights complaint, pursuant to 42 U.S.C. § 1983. He alleges Cleeta Meadows, administrator of the Parkside Nursing Home, did not follow proper procedures in terminating his employment as a nursing assistant. He alleges Ms. Meadows did not report the alleged sexual battery to the Department of Human Services until after his dismissal and, thereby, deprived Plaintiff of a state investigation. Plaintiff seeks back pay.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally

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frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

Having liberally construed Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff has not alleged a constitutional violation. Moreover, the conduct of Ms. Meadows does not constitute action under color of state law for purposes of a section 1983 violation. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970) (for a complaint under section 1983 to be sufficient a plaintiff must allege that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law).

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted**, and this action is hereby **dismissed** as frivolous pursuant to 28 U.S.C. § 1915(d). The Clerk shall **mail** a copy of the complaint and motion for leave to proceed in forma pauperis to Plaintiff.

SO ORDERED THIS 3rd day of January, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AEROMET, INC., an Oregon Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA, SMALL BUSINESS ADMINISTRATION,

Defendant.

Case No. 95-C-757K

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties hereto, pursuant to the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure, hereby stipulate that the above-referenced matter be and is hereby dismissed with prejudice to any subsequent refiling.

AEROMET, INC.

By: _____

James P. McCann, OBA #5685
Doerner, Saunders, Daniel & Anderson
320 South Boston Ave., Ste. 500
Tulsa, Oklahoma 74103
(918) 582-1211

UNITED STATES OF AMERICA

STEPHEN C. LEWIS
United States Attorney

By: _____

Wyn Dee Baker, OBA #465
Assistant U.S. Attorney
3460 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918) 581-7463

GLENN P. HARRIS
Trial Attorney
Office of General Counsel
U.S. Small Business Admin.
409 Third St., SW, 7th Floor
Washington, DC 20416
(202) 205-6643

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 3 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MERRELL HARRIS Plaintiff, v. DELTA AIRLINES, INC. a Delaware Corporation, Defendant.	)	Case No. 94-C 1186B

DATE JAN 4 1996

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for hearing on the Joint Stipulation of the plaintiff, MERRELL HARRIS, and for the defendant, DELTA AIR LINES, INC. for a dismissal with prejudice of the above-entitled case. This Court, being fully advised and having reviewed the Stipulation, finds that the parties have resolved this matter covering all claims and issues involved in this action and that this case should be dismissed with prejudice to the filing of any future action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the above-styled case is hereby dismissed with prejudice to the filing of a future action.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TINA SISCO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 94-C-1064-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed this date, Judgment is hereby entered in favor of the Defendant, United States of America, and against the Plaintiff Tina Sisco, and Plaintiff's action is hereby dismissed. The parties are to pay their own respective attorney's fees and costs are entered in favor of the Defendant if timely applied for pursuant to Local Rule 54.1.

DATED this 2nd day of ~~December, 1995~~ Jan. 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TINA SISCO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 94-C-1064-B

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This personal injury action brought under the Federal Tort Claims Act, 28 U.S.C. §1346(b), was tried to the Court sitting without a jury on December 20 and 21, 1995. Following consideration of the issues and the evidence presented, the applicable law, and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 27, 1993, Plaintiff, Tina Sisco, was an invitee customer of the West Tulsa U.S. Postal facility, 3408 West 42nd Place in Tulsa, Oklahoma.

2. At about 12:45 P.M., on August 27, 1993, Tina Sisco entered the public entrance of the West Tulsa facility in the company of her two small children; one fifteen months whom she was carrying and the other four years old, walking at her side. She took three or four steps across a mat immediately inside the front door and then stepped onto a vinyl floor surface where she slipped and fell, injuring her left knee.

3. Approximately two minutes before, the area of the vinyl lobby floor where Plaintiff fell had been damp mopped with cold water by custodian George Sheridan. This resulted in the area of the floor having moisture thereon from the mopping.

4. George Sheridan was an independent contractor custodian of the United States Postal Service. He had been awarded the custodial written fixed price contract following a bidding process. George Sheridan did not receive any of the usual employee benefits of postal employees. He was free to do the specified custodial work in the manner he chose from 1 P.M. to 6 P.M. daily, six days a week, so long as the specified cleaning work was accomplished. The postal service furnished all cleaning materials and supplies.

5. Immediately before Plaintiff's fall, George Sheridan had placed an A-frame yellow "Warning-Wet Floor" sign, which stood about two feet high, on the entry mat near the place where the damp mopping had just been accomplished. Said sign was appropriately placed and visible to customers such as the Plaintiff.

6. The fall resulted in Plaintiff being required to have surgery on the medial meniscus of her left knee, thereby incurring medical expenses totalling $5,324.80. She experienced pain and discomfort in the left knee and has from 5% to 10% permanent disability of the left knee.

7. There was not adequate time from the damp mopping of the subject area until Plaintiff's fall for the postal employees present to learn of any potentially hazardous condition caused by the damp mopping.

CONCLUSIONS OF LAW

1. The Court has jurisdiction and venue of the subject matter and the parties herein - 28 U.S.C. § 1331.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. Under the Federal Tort Claims Act (FTCA), the law of the state where the tort occurred provides the substantive law to be followed. Molzof v. United States, 116 L.Ed.2d 731, 739 (1992); United States v. Muniz, 374 U.S. 150, 153 (1963).

4. The evidence established that George Sheridan was an independent contractor at the time of Plaintiff's fall. The United States cannot be held liable for the acts of an independent contractor under the Federal Tort Claims Act. 28 U.S.C. §1346(b); United States v. Orleans, 425 U.S. 807 (1976); Creek Nation Indian Housing v. United States, 677 F.Supp. 1120, 1129 (E.D. OK 1988); and Flynn v. United States, 631 F.2d 678, 681 (10th Cir. 1980).

5. The evidence did not establish negligence on the part of the Defendant, U. S. Postal Service, because the alleged hazardous condition did not exist a sufficient length of time to place Defendant on notice thereof. Safeway Stores, Inc. v. Criner, 380 P.2d 712, 715 (Okl. 1963), and J. C. Penney v. Hoover, 414 P.2d 293 (Okl. 1966).

6. Further, the Court concludes that since a proper clearly visible "Warning-Wet Floor" sign was placed at the point of the potential hazard, the evidence has failed to establish negligence regarding failure to warn herein.

8. Contemporaneous with the filing of these Findings of Fact and Conclusions of Law, a Judgment shall be entered for the Defendant and against the Plaintiff.

DATED this 2nd day of ~~December, 1995~~ Jan, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SCOTT P. KIRTLEY, Trustee of PROGRESSIVE ACCEPTANCE CORPORATION, an Oklahoma corporation,

Plaintiff,

vs.

J.C. BRADFORD & COMPANY, a Tennessee limited partnership, and J. STEVENS CORPORATION, a Delaware corporation,

Defendants.

No. 90-C-204-H

STIPULATION FOR DISMISSAL

COME NOW the Plaintiff, Scott P. Kirtley, Trustee of Progressive Acceptance Corporation, and the Defendant, J. C. Bradford & Company and stipulate to the dismissal with prejudice of all claims and causes of action asserted in this case by Plaintiff, and stipulate to the dismissal without prejudice of the cross-claim asserted by Defendant J. C. Bradford & Company against J. Stevens Corporation, with each party to bear its own costs, fees and expenses.

Respectfully submitted,

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

By _____

C. S. Lewis, III, OBA #5402
Marilyn M. Wagner, OBA #6292
P. O. Box 1046
Tulsa, Oklahoma 74101
(918) 587-3161

ATTORNEYS FOR PLAINTIFF

-and-

CROWE & DUNLEVY

By _____
Terry M. Thomas, OBA #8951
Suite 500
321 South Boston
Tulsa, Oklahoma 74103-3313
(918) 592-9800

ATTORNEYS FOR DEFENDANT
J.C. BRADFORD & COMPANY

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID M. LUKE,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 93-C-745-W

ORDER

This order pertains to the Application by Plaintiff and Motion for a Final Order and for Attorney's Fees and Expenses Under the Equal Access to Justice Act ("EAJA") (Docket #24), Defendant's Brief in Opposition to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act (Docket #26), Plaintiff's Reply to the "Brief in Opposition to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act" (Docket #27), and Plaintiff's Computation of Hourly Fees (Docket #29).

On June 30, 1995, this court affirmed the decision of the ALJ denying social security disability benefits to claimant. Claimant filed a Motion to Reconsider the order, relying on a recent Tenth Circuit opinion, Cruse v. U.S. Dept. of Health & Human Servs., 49 F.3d 614 (10th Cir. 1995). Defendant argued that the facts in the opinion could be distinguished

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

from the facts in this case. However, on August 3, 1995, this court granted the Motion to Amend Judgment and found that claimant was entitled to disability benefits, relying largely on the Tenth Circuit opinion. Plaintiff is therefore the prevailing party in this case.

Under the EAJA, 28 U.S.C. § 2412(d), a court may award attorney fees to a "prevailing party . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The Supreme Court has held that "substantially justified" does not mean justified to a high degree, but rather "has been said to be satisfied if there is a 'genuine dispute' . . . or 'if reasonable people could differ as to [the appropriateness of the contested action].'" Pierce v. Underwood, 487 U.S. 552, 565 (1988) (citations omitted). The Court held that a position can be "substantially justified" if it was justified for the most part, that is, if it has a reasonable basis in law and fact. Id.

When the district court enters judgment in a claimant's favor, this does not mean that he is automatically entitled to EAJA fees. Id. at 569. "[T]he fact that one other court agreed or disagreed with the government does not establish whether its position was substantially justified." Id.

The defendant argues that she was justified in defending this action, in which the issue was whether claimant's complaints of depression, alcohol dependency, and personality disorder prevented him from engaging in any employment. The credibility of claimant's testimony was material to the ALJ's decision. The ALJ concluded that the testimony was credible only to the extent it was reconciled with an ability to do medium work at a low stress occupation. The ALJ relied on testimony of a licensed psychiatrist in making his

decision, disregarding opinions of several therapists that he could not maintain employment. "Credibility is the province of the ALJ." Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). In its original order, the court found that there was substantial evidence to support the ALJ's decision. The defendant was justified in defending the action up to that point, as there was a genuine issue of credibility about which reasonable people could differ.

Under the law in Cruse, the residual functional capacity form completed by the licensed psychiatrist took on a new significance, of which the ALJ was unaware when making his decision. Therefore, the hypothetical question posed to the vocational expert did not accurately reflect plaintiff's ability to deal with work stresses. This court concluded that the Secretary had not met the burden of establishing that plaintiff's impairment did not prevent him from doing relevant work available in the national economy, so the award of benefits was appropriate.

The court finds that the position taken by defendant in defending the action after the Motion to Reconsider was filed raising the new Tenth Circuit case was not substantially justified. The Application by Plaintiff and Motion for a Final Order and for Attorney's Fees and Expenses Under the Equal Access to Justice Act (Docket #24) is granted as to counsel's fees for hours worked from July 5, 1995 through October 26, 1995, which totaled 6.95 (see pg. 3 of movant's itemized statement of legal services rendered, Docket #25), plus 2.0 hours for preparation of Plaintiff's Reply to the "Brief in Opposition to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act," or a total of 8.95 hours.

Plaintiff's counsel asks to be compensated at an hourly rate of $123.00. Under the EAJA, the statutory maximum for attorney fees is $75.00 per hour. Counsel claims an entitlement to the higher rate based on the increased cost of living since the enactment of the EAJA in 1981 as evidenced by the Consumer Price Index published by the United States Department of Labor.

Section 2412(d)(2)(A) of the EAJA provides that: " . . . attorney's fees shall not be awarded in excess of $75.00 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." Complete discretion is afforded district courts in awarding attorney fees under the EAJA. Pierce v. Underwood, 487 U.S. 552, 571 (1988); Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989).

Plaintiff's counsel is entitled to an hourly fee of $123.00. According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994), the Consumer Price Index for All Urban Consumers ("CPI-U") was $93.40 in October of 1981 and $152.90 in August of 1995. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves $59.50, and that number divided by the old CPI-U, which is .64, and multiplied by 100, which results in a 64% change. The base rate for attorney's fees is $75.00 and 64% of that rate is $48.00. The total fee is the base rate plus the increase in fee resulting from a higher CPI-U, or a total fee of $123.00 per hour for 8.95 hours, or $1,100.85 plus expenses in the amount of $15.00, for a total award of $1,115.85.

Dated this 2nd day of January, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:luke.4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 04 1996

JAMI GUFFEY,

Plaintiff,

v.

MILL CREEK LUMBER & SUPPLY CO., an Oklahoma corporation; OWASSO LUMBER COMPANY, an Oklahoma corporation; and ALTERNATIVE LABOR RESOURCES, INC., an Oklahoma corporation,

Defendants.

Case No. 95-C-653-K

FILED
JAN 03 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of the parties, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice. Each party is to bear its own attorney fees and costs.

So Ordered this 3 day of January, 1996.

s/ TERRY C. KERN

United States District Judge

APPROVED AS TO FORM AND CONTENT:

Attorney for Owasso Lumber Co., Inc. and Mill Creek Lumber & Supply Co.

Attorney for Plaintiff

Attorney for Alternative Labor Resources, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN EMPLOYERS INSURANCE COMPANY,

Plaintiff,

vs.

BOYD DEAN GARRETT; and JONATHAN JOHNSON,

Defendants.

Case No. 94-C-825-K

ORDER OF DISMISSAL OF PLAINTIFF'S COMPLAINT

NOW, on this 3 day of ~~December~~ January, 1996, upon the written stipulation of the Plaintiff for a dismissal with prejudice of the Plaintiff's Complaint, the Court, having examined said Stipulation for Dismissal, finds that the parties have entered into a compromise settlement of all the claims involved herein, and the Court, being fully advised in the premises, finds that the Plaintiff's Complaint against the Defendants should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the Complaint of the Plaintiff against the Defendants be and the same is hereby dismissed with prejudice to any further action.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELISA FLOYD GINEST,

Plaintiff,

vs.

FARM BUREAU INSURANCE,

Defendant.

Case No. 95 C 1020K

ENTERED ON DOCKET
DATE JAN 04 1996

FILED

JAN 03 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the parties' Joint Stipulation and Application for an Order of Dismissal With Prejudice of any and all claims that have been asserted or which might have been asserted in this action, and good cause having been shown, it is this 3 day of January, 1996.

ORDERED that the parties Joint Stipulation and Application for an Order of Dismissal with Prejudice be and it is hereby GRANTED; and it is further

ORDERED that the above-captioned action be and it is hereby DISMISSED WITH PREJUDICE, each party to pay their own costs and attorneys' fees.

s/ TERRY C. KERN
United States District Court Judge

105930

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHLEEN E. BERNA,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-1003-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Secretary's decision has been entered. Consequently, judgment for the Defendant and against the Plaintiff is hereby entered.

It is so ordered this 2nd of January 1996.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHLEEN E. BERNA,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-1003-J

ORDER[2/]

Now before the Court is Plaintiff's appeal of the Secretary's decision denying her Disability Insurance and Supplemental Security Income benefits. The Administrative Law Judge ("ALJ") found that Plaintiff was not disabled because Plaintiff retains the residual functional capacity ("RFC") to perform her past relevant work. Plaintiff argues that the ALJ failed to carry out his duty of inquiry regarding the demands of her past relevant work. The Court does not agree and, therefore, **AFFIRMS** the Secretary's decision.

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed February 17, 1995.

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I. SUMMARY OF THE EVIDENCE

A. Plaintiff's Alleged Impairments

Plaintiff argues that she is disabled due to (1) pain/numbness/weakness in her right knee and foot, (2) pain in her right arm and shoulder, (3) pain in her neck, (4) pain and spasms in her low back, (5) headaches, (6) a brain aneurysm, (7) hearing loss, (8) pain associated with ulcers, (9) a hiatal hernia, (10) a bad heart, and (11) reduced memory. *R. at 101-116, 176-80.*

B. Plaintiff's Educational and Vocational Background

At the time of the hearing below, Plaintiff was a 51 year old female with a 9th grade education. From 1982 to 1986, Plaintiff worked as an assistant manager at Schlotzsky's restaurant. From 1987 to 1991, Plaintiff worked at Fair Meadows Racetrack for the Tulsa County Public Facilities Authority. *R. at 93-100, 173-74.* Prior to working for Schlotzsky's, Plaintiff worked as a cocktail waitress and as a clothes sorter for Goodwill. *R. at 175.*

C. Plaintiff's Medical History

Plaintiff was injured on September 14, 1991 while working at Fair Meadows. On that date, a small child ran between Plaintiff's legs and knocked her down. Plaintiff fell on a concrete floor and struck her right knee and right elbow. Plaintiff continued to work for approximately another three weeks until her symptoms became too severe. Plaintiff last worked on October 6, 1991. *R. at 128-29.*

On October 23, 1991, Plaintiff went to see G.D. Snitker, a chiropractor. At that time, Dr. Snitker concluded that as a result of the September 14th fall, Plaintiff had "acute thoraco/cervical sprain", headaches, pain in her chest and "acute right knee sprain." *R. at 128-29.* There are no medical records for the period of October 1991 to February 1992, when Plaintiff went to see Alan Holderness, M.D., an orthopedic surgeon.

Dr. Holderness determined that Plaintiff had torn the cartilage in her right knee. On February 7, 1992, Dr. Holderness performed arthroscopic surgery at Hillcrest Medical Center to repair the cartilage in Plaintiff's right knee. Other than the torn cartilage, Plaintiff's right knee was normal. *R. at 139-45.*

Plaintiff last saw Dr. Holderness on May 27, 1992 and Dr. Holderness completed a written report on May 29, 1992. For purposes of Plaintiff's workers' compensation claim, Dr. Holderness determined that Plaintiff suffered 29% disability in her right knee. Dr. Holderness also determined that due to degeneration of the joint in Plaintiff's right shoulder, she suffered 25% disability in the right shoulder as well. If the joint in the right shoulder continues to degenerate, Dr. Holderness indicated that Plaintiff might need surgery on her right shoulder in the future. *R. at 130-38.*

On January 27, 1993, Plaintiff's hearing was evaluated by Roger Wehrs, M.D., an otolaryngologist. Dr. Wehrs determined that (1) Plaintiff's hearing was normal in both ears, (2) Plaintiff had above average speech discrimination, and (3) Plaintiff did not need hearing aids or tubes. *R. at 146-47.*

Plaintiff testified that 14-15 years ago a Dr. Adam Marook diagnosed her with an inoperable brain aneurysm. Plaintiff testified that this aneurysm had never been treated or followed up on. Plaintiff testified that a Dr. Boxer told her that she has three disks in her neck that are "messed up." Plaintiff also testified that she has a hiatal hernia and ulcers. *R. at 177-180.* There are, however, absolutely no medical records in the file which support any of these alleged impairments. Plaintiff's testimony, without some objective medical evidence, is simply not enough to carry her burden to establish that these impairments are medically severe. See, 20 C.F.R. §§ 404.1528(a) and 416.928(a).

Plaintiff also reported to the Social Security Administration that the anesthesiologist assisting Dr. Holderness on her February 1992 knee surgery told her that her EKG showed a mild heart attack. *R. at 109.* There are, however, no heart tests or EKG reports in the file, other than the EKG taken while Plaintiff underwent surgery in 1992. That EKG report, attached to Plaintiff's February 1992 Hillcrest Medical Center records, was a normal, and it showed that Plaintiff's heart had a normal sinus rhythm. *R. at 145.*

D. Consultive Examinations

Plaintiff was examined by Thomas Goodman, M.D., a psychiatrist, on January 27, 1993. Dr. Goodman found no indications that Plaintiff was suffering from a thinking or speech disorder, delusions, hallucinations, or suicidal tendencies. Dr. Goodman noted that despite her complaints of psychological problems from a young age, Plaintiff has never sought consistent psychiatric care. Dr. Goodman felt that

Plaintiff's complaints were suggestive of some type of "secondary gain." *R. at 149-52.*

Dr. Goodman could not find any definite or significant psychiatric disorder. Dr. Goodman felt that Plaintiff may have a mild to moderate adjustment disorder with some features of anxiety and depression. However, in Dr. Goodman's opinion, this was not severe enough to interfere with Plaintiff's returning to her previous work. In short, Dr. Goodman determined that "[p]sychologically [,] I see no reason why she could not return to simple or moderately complicated type work activities." *R. at 151-52.*

Ron Smallwood, Ph.D., completed a Psychiatric Review Technique ("PRT") form on February 3, 1993. Dr. Smallwood determined that Plaintiff did have an adjustment disorder and personality disorder that was not of listing-level severity. See 20 C.F.R. Pt. 404, Subpt. P, App. 1. Dr. Smallwood determined that these disorders caused (1) only a slight restriction of Plaintiff's daily activities, and (2) only slight difficulties in Plaintiff's ability to maintain social functioning. Dr. Smallwood also determined that Plaintiff's disorders (1) seldom caused deficiencies in Plaintiff's concentration, persistence or pace, and (2) never caused an episode of deterioration or decompensation in work or work-like settings. *R. at 65-73.* The PRT completed by the ALJ reflects the same conclusions. *R. at 23-26.*

Vallis Anthony, M.D. performed an RFC assessment on Plaintiff on September 14, 1992. His findings were consistent with a conclusion that Plaintiff could perform medium work with some limitation on Plaintiff's ability to climb, crouch or reach

overhead. Dr. Anthony determined that Plaintiff could (1) occasionally lift 50 pounds, (2) frequently lift 25 pounds, and (3) stand, sit or walk for about six hours in an eight hour workday. Dr. Anthony also determined that Plaintiff had no limitation of her ability to push and/or pull with her hands or feet. On February 18, 1993, Thurma Fiegl, M.D., affirmed Dr. Anthony's RFC assessment as written.

II. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Secretary has established a five-step sequential evaluation process.[3/]

[3/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482

The standard of review to be applied by this Court to the Secretary's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Secretary's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Secretary. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Secretary's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The Court will typically defer to the ALJ's determinations of witness credibility. Hamilton v. Secretary of H.H.S., 961 F.2d 1495, 1498 (10th Cir. 1992). While evaluating medical evidence, however, more weight will be given to evidence from a treating physician than will be given to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the Plaintiff. Williams, 844 F.2d at 757-58; Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If the ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

In addition to determining whether the Secretary's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Secretary applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Secretary's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Based on the above-discussed evidence, the ALJ determined that Plaintiff retained the RFC to perform sedentary or light work. In her brief on appeal, Plaintiff does not argue that this finding is not supported by substantial evidence. In any event, the Court finds that the record contains substantial evidence to support the

ALJ's conclusion.

The ALJ also determined, at Step 4 of the sequential evaluation process, that Plaintiff could perform her past relevant work, as that work is defined by the United States Department of Labor's Dictionary of Occupational Titles ("DOT"). As defined by the DOT, Plaintiff's past relevant work is in the "light" exertional category. See 20 C.F.R. § 404.1567(b); and *R. at 184-86.* In her Vocational Report, Plaintiff stated that she had to frequently carry 40-50 pound boxes and bags of ice. *R. at 93-100.* As described by Plaintiff, her past relevant work was at the "medium" exertional level. See 20 C.F.R. § 404.1567(c). Thus, the question is whether Plaintiff's past work was at the "light" or the "medium" exertional level.

The Tenth Circuit has held that "past relevant" work includes both (1) the actual functional demands of the past work actually performed by Plaintiff, and (2) the functional demands of Plaintiff's past work as it is normally performed in the national economy. Andrade v. DHHS, 985 F.2d 1045, 1050-51 (10th Cir. 1993). See also Social Security Ruling 82-61. In this case, the Vocational Expert ("VE") testified that Plaintiff's past work is normally performed at the "light" exertional level, despite the fact that Plaintiff actually performed it at the "medium" exertional level. Thus, in order to carry her burden at Step 4 of the sequential evaluation process, Plaintiff must establish that she is not capable of performing "light" work. Id. In light of the above-discussed evidence, Plaintiff cannot carry this burden -- she is capable of performing light work.

The Tenth Circuit has held that at step four of the sequential evaluation process, the ALJ's duty of inquiry "requires the ALJ to review the claimant's [RFC] 'and the physical and mental demands of the work [she has] done in the past." Henrie v. DHHS, 13 F.3d 359, 361 (10th Cir. 1993) (citing 20 C.F.R. § 404.1520(e)). It is important to note, however, that the ALJ must inquire only about those past work demands "which have a bearing on the medically established limitations." Social Security Ruling 82-62. The only limitations established by Plaintiff in this case are exertional. Thus, the ALJ need only consider the exertional demands of Plaintiff's past work.

Plaintiff argues that the ALJ in this case failed in his duty to inquire about the physical demands of Plaintiff's past relevant work as required by Henrie. The Court does not agree. In Henrie, the plaintiff's prior occupation was never mentioned in the record. The record was "devoid of evidence" regarding the demands of plaintiff's past job. Henrie, 13 F.3d at 361. Unlike in Henrie, the record in this case is not "devoid" of evidence regarding the demands of Plaintiff's work. Plaintiff's Vocational Report [*r. at 93-100*] contains a detailed description of the exertional demands of her past work. Plaintiff also provided some testimony regarding the nature of her previous work. See, Smith v. Chater, 62 F.3d 1429, 1995 WL 465814, *3 (10th Cir. Aug. 8, 1995) (recognizing that documentary and testimonial evidence regarding demands of past work can be sufficient); and Social Security Ruling 82-61 (recognizing that a properly completed Vocational Report may be sufficient to provide information about past work).

The Court also finds that even if Plaintiff could establish that she was incapable of performing her past relevant work, there is sufficient evidence in the record establishing that even with Plaintiff's current impairments, there are a significant number of other jobs in the national economy which she is capable of performing. That is, there is sufficient evidence in the record for the Secretary to carry her burden at step five of the sequential evaluation process. The ALJ described the following hypothetical person to the vocational expert: (1) 51 years old, (2) ninth grade education, (3) medium ability to read, write and use numbers, (4) can perform sedentary or light work, (5) has back problems, ulcers and a hernia, (6) has chronic pain, and (7) has to change position from time to time to relieve pain. *R. at 185.* The Court finds that this hypothetical adequately describes Plaintiff's impairments. With respect to this hypothetical person, the vocational expert described five different jobs with approximately 10,000 positions in Oklahoma. *R. at 186.* This is sufficient to carry the Secretary's burden at step five.

For the foregoing reasons, the Secretary's decision is **AFFIRMED**.

IT IS SO ORDERED.

Dated this 2nd day of January 1996.

Sam A. Joyner
United States Magistrate Judge

DOCKET NO. 1048

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE FELBATOL PRODUCTS LIABILITY LITIGATION

Kelli R. Hart, et al. v. Carter-Wallace, Inc., et al., S.D. Iowa, C.A. No. 3:95-10149
Betty J. Harp, et al. v. Carter-Wallace, Inc., et al., N.D. Oklahoma, C.A. No. 4:95-1032-E

CONDITIONAL TRANSFER ORDER (CTO-9)

On April 4, 1995, the Panel transferred one civil action to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than five additional actions have been transferred to the Northern District of C[illegible]nia. With the consent of that court, all such actions have been assigned to the Honorable Eugene F. Ly[illegible].

It appears from the pleadings filed in the above-captioned actions that they involve questions of fact which are common to the actions previously transferred to the Northern District of California and assigned to Judge Lynch.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the above-captioned actions are hereby transferred under 28 U.S.C. §1407 to the Northern District of California for the reasons stated in the order of April 4, 1995, and, with the consent of that court, assigned to the Honorable Eugene F. Lynch.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Northern District of California. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM WICKHAM
SS# 444-58-1753

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner,
Social Security Administration

Defendant.

NO. 94-C-416-B

FILED

JAN - 2 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN - 3 1996

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation and ORDERS that the decision of the Secretary BE REMANDED for further action in accordance with the recommendation of the Magistrate Judge.

Dated this 2nd day of Jan., 1996.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM WICKHAM
SS# 444-58-1753

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner, Social Security Administration

Defendant.

NO. 94-C-416-B

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 2nd day of January, 1996.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

(12)

DSF/tsr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL STANBERY, INDIVIDUALLY, AND AS NEXT FRIEND OF HER MINOR DAUGHTER, MELISSA STANBERY, Plaintiff,	)	
vs.	)	Case No. 94-C-1195-B
JAMES S. OHLSON, PRE-FAB TRANSIT CO., AND PROTECTIVE INSURANCE COMPANY, a foreign corporation, Defendants.	)	ENTERED ON DOCKET DATE JAN - 3 1996

ORDER OF DISMISSAL

Upon the Application of the Plaintiff and for good cause shown this action is hereby dismissed with prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIM LUMAN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 93-C-297-B

ORDER

Before the Court are Petitioner's notice of appeal filed on December 18, 1995, and Petitioner's motion for a certificate of probable cause (docket #49). Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus with regard to his conviction in Luman I, Tulsa County District Court Case No. CF-89-1006. Petitioner is not proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Stevenson v.

(52)

Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

After considering the record in Luman I, the Court concludes that a certificate of probable cause should not issue in this case because Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issues differently.

Accordingly, Petitioner's motion for issuance of a certificate of probable cause is DENIED Fed. R. App. P. 22(b).

SO ORDERED THIS 2nd day of Jan., 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK L. PAYNE,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of the Social Security Administration,

Defendant.

Case No. 91-C-308-E

O R D E R

Before the Court is the Application and Motion for Award of Attorney's Fees and for Approval of Award to Plaintiff and brief in support filed by Plaintiff by and through his attorney, Mark E. Buchner (Docket Nos. 25 and 26). Mr. Buchner seeks attorney's fees pursuant to 42 U.S.C. §406(b) in the amount of $20,000 based on 67.85 hours of legal services he provided in the successful appeal of the Commissioner's denial of Plaintiff's Social Security Disability benefits.

While the government does not object to the number of hours of legal services expended by Mr. Buchner in the appeal, the government does object to the calculated hourly rate of $294/hour sought by Mr. Buchner. The government argues that a reasonable hourly rate is $150/hour and that Plaintiff has submitted no specific evidence which warrants an enhancement.

Mr. Buchner contends that the government is erroneously analyzing the application for attorney fees as one under a fee shifting statute, rather than as an application under §406(b) which allows for a contingency fee agreement between the claimant and his

attorney not to exceed 25% of the claimant's back-due benefits. Plaintiff was awarded $100,000 in back benefits due to his successful appeal. As a result, the Commissioner has withheld 25% of the award for attorney's fees. Mr. Buchner seeks an award of $20,000 based on his contingency fee agreement with the Plaintiff, which is less than the statutory maximum. Further, Plaintiff testifies in his affidavit that he has reviewed the application and agrees with a $20,000 attorney's fee award from his back benefits.

Based on Mr. Buchner's successful appeal in this case which resulted in the reopening of prior applications for benefits, and Plaintiff's agreement with the amount of fees requested by Mr. Buchner, the Court grants Plaintiff's application (Docket No. 25) and awards Plaintiff's attorney $20,000 in fees. Plaintiff's Motion to Set Cause for Hearing (Docket No. 32) is thus moot.

IT IS SO ORDERED THIS 2nd DAY OF JANUARY, 1996.

James O. Ellison

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES M. MILLER,

Plaintiff,

vs.

Case No. 93-C-442-W

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

ORDER

This order pertains to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412 (Docket #11) and Defendant's Response (Docket #13). Defendant has responded that she does not object to such an award. On September 6, 1995, the court remanded this case to secure the testimony of a vocational expert to determine whether claimant can do his past relevant work or other jobs in the national economy (Docket #9).

Under the EAJA, a party seeking an award of fees and other expenses must show he is a prevailing party and must apply for fees within thirty days of final judgment in the action. The court's September 6, 1995 order was a final judgment, and Plaintiff is a prevailing party entitled to fees under the EAJA. Plaintiff's counsel asks to be compensated

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

at an hourly rate of $118.20. Under the EAJA, the statutory maximum for attorney fees is $75.00 per hour. Counsel claims an entitlement to the higher rate based on the increased cost of living since the enactment of the EAJA in 1981 as evidenced by the Consumer Price Index published by the United States Department of Labor.

Section 2412(d)(2)(A) of the EAJA provides that: ". . . attorney's fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." Complete discretion is afforded district courts in awarding attorney fees under the EAJA. Pierce v. Underwood, 487 U.S. 552, 571 (1988); Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989).

According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994), the Consumer Price Index for All Urban Consumers ("CPI-U") was 93.4 in 1981 and 153.2 in September, 1995. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 59.80, and that number is divided by the old CPI-U, which is .64, and multiplied by 100, which results in a 64% change. The base rate for attorney's fees is $75.00 and 64% of that rate is $48.00. The total fee is the base rate plus the increase in fee resulting from a higher CPI-U, or a total fee of $123.00 per hour.

Plaintiff is awarded an Equal Access to Justice Attorney Fee at the rate of $123.00 per hour multiplied by 14.75 hours for a total fee of $1,814.25 plus filing fees and court costs in the amount of $127.10. Plaintiff is awarded a total award of Attorney Fees and

Costs pursuant to the Equal Access to Justice Act in the total amount of $1,941.35.

Dated this 2nd day of January, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:Miller.3

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 29 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CAROLYN CARROLL,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 93-CV-1137-J

ENTERED ON DOCKET

DATE 1-2-96

ORDER

On May 5, 1995, this Court remanded the above-captioned case to the Administrative Law Judge ("ALJ") for further administrative proceedings. Plaintiff's motion for attorney fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) is currently before this Court.

The EAJA requires the United States to pay attorney fees and costs to a "prevailing party" unless the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). The United States has the burden of proof to establish that its position was substantially justified. Kemp v. Bowen, 822 F.2d 966, 967 (10th Cir. 1987).

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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In Pierce v. Underwood, 487 U.S. 552, 565 (1988), the Supreme Court defined "substantially justified" as "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." "That phrase does not mean a large or considerable evidence, but such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 564.

> [A] position can be justified even though it is not correct, and . . . it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. Id. at 565.

Less stringent proof requirements were considered and rejected by the Pierce court. "Substantially justified" is more than "merely undeserving of sanctions for frivolousness." A burden of proof higher than reasonableness, as suggested in the Brennan dissent, was rejected, as well.

> Between the test of reasonableness, and a test such as "clearly and convincingly justified"--which no one, not even respondents, suggests is applicable--there is simply no accepted stopping place, no ledge that can hold the anchor for steady and consistent judicial behavior. Id. at 567.

Subsequent Tenth Circuit Court of Appeals rulings have further described this "ledge that can hold the anchor of consistent judicial behavior". In Hadden V. Bowen, 851 F.2d 1266, 1269 (10th Cir. 1988) the court found that a reversal based upon a lack of substantial evidence in the record does not automatically translate into an award of attorney fees. The court noted that the circuits which have addressed the issue "have all concluded that a lack of substantial evidence indicates, but does not conclusively establish, that the government's position concerning a claim was not substantially justified." Hadden, 851 F.2d 1266, 1269 (10th Cir. 1988). The Tenth

Circuit adopted the majority rule and held that "a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." Id. The court has also found the mere fact that the district court below affirmed the ALJ's decision does not automatically mean that the governments's position was reasonable and therefore substantially justified. Weakley v. Bowen, 803 F.2d 575, 578 (10th Cir. 1986).

In this case, Magistrate Judge Wolfe found that the Commissioner correctly analyzed the medical evidence and properly evaluated Plaintiff's complaints of pain. See Order, May 5, 1995 at 3-4. The court remanded the case so that the ALJ could hear from a Vocational Expert concerning the impact of Plaintiff's nonexertional pain impairment. Id. at 4-5. In making this determination, the court found:

> This case, similar to many others dealing with this issue, is a close call: Does substantial evidence show Carroll's pain is insignificant? On one hand, substantial evidence supports the ALJ's finding that Carroll's pain is not disabling in itself. On the other hand, substantial evidence indicates that Carroll suffers from pain, although a question exists as to what degree.
>
> After much deliberation, the undersigned finds that the ALJ should have called a Vocational Expert to testify. . . Id. at 5.

The court also observed that no hard and fast rule exists. It is hard to imagine language that could have more strongly indicated that there is reasonable basis in law and fact for the government's position in spite of the remand.

After a review of the record and the briefs submitted by the parties, the Court finds that the position of the United States was substantially justified, and Plaintiff's request for fees and costs pursuant to the EAJA is denied.

Dated this 29 day of December 1995.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNIE STUBBLEFIELD,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-992-J

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Secretary has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 29 day of December 1995.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

12

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNIE STUBBLEFIELD,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1\]

Defendant.

No. 94-C-992-J

ORDER[2\]

Plaintiff, Johnie Stubblefield, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.[3\] Plaintiff asserts error because (1) the ALJ's finding that Plaintiff retained the RFC to perform the sitting requirement of sedentary work is not supported by substantial evidence,

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[1\] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2\] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3\] Plaintiff's current application for disability insurance benefits was filed August 9, 1990. *R. at 16.* (Plaintiff previously filed applications for disability and supplemental security insurance on March 6, 1987, and November 13, 1988. *R. at 16, 98, 200-02.* Both applications were denied.) The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 11, 1992. *R. at 39.* By order dated May 29, 1992, the ALJ determined that Plaintiff was not disabled. *R. at 429.* The Plaintiff appealed, and the Appeals Council remanded the decision to the ALJ for further review. *R. at 461-62.* A second hearing was held on July 7, 1993. *R. at 62.* By order dated July 27, 1993 the ALJ determined that Plaintiff was not disabled. *R. at 16-28.* The Plaintiff again appealed the ALJ's decision to the Appeals Council. On September 14, 1994 the Appeals Council denied Plaintiff's request for review. *R. at 5.*

and (2) the ALJ's finding that a substantial number of jobs existed which Plaintiff can perform is not supported by substantial evidence. For the reasons discussed below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on April 3, 1945, and has a twelfth grade education. *R. at 42, 66.* Plaintiff claims he was disabled, while working at his job, on January 6, 1986. *R. at 98.*

Plaintiff asserts that he suffers from severe back pain which prevents him from standing more than ten to fifteen minutes, or sitting longer than fifteen minutes. *R. at 47, 72.* Plaintiff currently collects workers' compensation, and testified that he has been declared "100% disabled" under the workers' compensation laws. *R. at 51.*

II. STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Secretary has established a five-step process for the evaluation of social security claims.[4] See 20 C.F.R. § 404.1520.

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams,

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[4] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. REVIEW

Residual Functional Capacity[5]

Plaintiff asserts that the ALJ failed to properly evaluate Plaintiff's RFC. Plaintiff contends that the performance of sedentary work requires the ability to sit for six hours out of an eight hour day, but that Plaintiff testified he can sit for only fifteen minutes at one time.

The ALJ concluded that Plaintiff's testimony was not fully credible,[6] and that although Plaintiff had a back impairment, he was not fully precluded from working. The ALJ determined that Plaintiff could perform work, except for work which required lifting more than ten pounds, or prolonged walking or standing. *R. at 24.* In addition, the ALJ noted that Plaintiff should be permitted to change positions to alleviate his symptoms. *R. at 22.* The ALJ determined, based on vocational testimony, that although Plaintiff could not perform his past relevant work a significant number of jobs which Plaintiff could perform existed in the national and local economy. *R. at 25.* The court holds that the findings of the ALJ are supported by substantial evidence.

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[5] Residual Functional Capacity ("RFC") is "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirement of jobs." 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c).

[6] Credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

A claimant is not automatically disabled merely because the individual cannot perform the full range of work of a particular category of work. The regulations require that a vocational expert be consulted, and the individual's limitations presented to the expert. Reliance on a vocational expert can constitute substantial evidence that an individual is not disabled. See, e.g., Kelley v. Chater, 62 F.3d 335 (10th Cir. 1995). Consequently, if the ALJ's findings as to Plaintiff's RFC are supported by the record, and those limitations were properly presented to a vocational expert, the ALJ's findings as to disability are supported by substantial evidence.

Plaintiff asserts that he injured his back while at his job in early January 1986. *R. at 45.* Plaintiff testified that his daily activities included playing dominoes from 9:30 a.m. until noon, taking a one hour to one and one-half hour nap, and playing dominoes for three hours in the evening. *R. at 73.* Plaintiff stated that while playing dominoes he stood approximately every fifteen minutes. *R. at 92.* Plaintiff testified that the longest he would be able to sit during an eight hour work day is three hours, and the longest that he would be able to stand is three hours. *R. at 75.* Plaintiff has seen numerous doctors and has been evaluated for his workers' compensation[7] claim.

The opinion of a treating physician is entitled to more weight than that of an examining physician. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician

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[7] Plaintiff testified that his current income from workers' compensation is $700 per month. *R. at 43-44.* Plaintiff believes that his total benefit from workers' compensation is $200,000. However, his attorney arranged for him to be paid monthly to "keep [him] from blowing every penny I got." *R. at 51.*

appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

One of Plaintiff's treating physicians, Dr. Shaddock, on February 26, 1986 interpreted his CT scan as showing "mild central disc bulging at L5-S1 with no other significant changes." *R. at 147.* On August 7, 1986, Dr. Shaddock noted that Plaintiff's CT scan indicated no herniation and "that he has had a series of normal tests, none of which demonstrate a herniated disc or other surgically correctable lesion in his low back and that I do not recommend surgery. . . . I do not know why he has failed to improve from a symptomatic standpoint." *R. at 148.* Dr. Shaddock released Plaintiff from his care, to the care of Dr. Krug.

Dr. Krug, on December 24, 1986, noted that he believed Plaintiff was suffering from a lumbar strain and a probable ruptured disc. *R. at 159.* By letter dated September 26, 1986, Dr. Krug indicated that he believed Plaintiff was currently disabled and had been unable to work since the time of his injury. *R. at 160.* Dr. Krug indicated that his opinion was based on Plaintiff's pain which was consistent

with a herniated lumbar disc.[8] *R. at 160.* Dr. Krug suggested that Plaintiff be referred to another doctor for further evaluation.

A lumbar myelogram was interpreted on February 4, 1987 as "normal." *R. at 170.* On May 5, 1987, Plaintiff's doctor, David G. Carr, D.O., summarized Plaintiff's tests.

> An outpatient MRI scan was done which disclosed the presence of a probable herniated disc on the left side at L4-5. Unfortunately, his complaints were more suggestive of a problem at the L5-S1 level. A CT scan was done which failed to show pathology at either the L-4 or L-5 level. The patient was brought into the hospital and underwent a lumbar myelogram on 2-3-87 followed by a postmyelographic CT scan. Neither of these studies demonstrated the presence of ruptured disc or identifiable nerve compression. The patient had these same studies done in Saint Francis Hospital in mid-1986 with similar findings.

R. at 173. Although Dr. Carr's interpretation of Plaintiff's records is similar to Dr. Shaddock's, Dr. Carr nevertheless concluded that Plaintiff was temporarily totally disabled until Plaintiff could receive relief from his pain. Dr. Carr recommended that, upon approval of Plaintiff's workers' compensation, Plaintiff should receive a spinal cord stimulator to control his pain. *R. at 173.*

On April 28, 1988, Plaintiff had a lumbar laminectomy. His surgeon, Daniel R. Stough, M.D., noted that Plaintiff had a good convalescence and "was discharged on 5-2-88, ambulatory . . . . and seemed to be doing very well." *R. at 351.* On May 24, 1988, Dr. Stough reported that Plaintiff was experiencing a distinct lessening of his

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[8] Plaintiff's CT scan showed mild bulging but no other significant changes, and no herniation. *R. at 147, 148.* A lumbar myelogram on February 4, 1987 was "normal." *R. at 160.*

back pain, but had "some discomfort over the left SI joint with some aching down the left leg." *R. at 350.* The doctor noted that the incision on his back appeared to be healing well, and that Plaintiff tolerated straight leg raising to 90 degrees on either side without complaints. *R. at 350.* The doctor noted that Plaintiff is to "walk up to a half mile twice daily for exercise, do leg swings, 50 times with each leg during the course of each day and he is to give up using this cane, which I think he has come to depend on far too much. I can see no reasonable need for the cane." *R. at 350.*

On August 23, 1988 Daniel R. Stough, M.D., noted he was discharging Plaintiff from his care. Dr. Stough stated that Plaintiff should not return to his previous construction work, but should "get into work that is less physically demanding." *R. at 348.* On April 18, 1990, Dr. Stough noted that Plaintiff's X-rays of the lumbar spine appear normal, but that because of Plaintiff's continuing complaints, Plaintiff should have an MRI scan of the lumbar spine to determine whether there is any disc herniation. *R. at 346.* Dr. Stough additionally noted that "[i]t was my opinion in August of 1988 that Mr. Stubblefield had attained maximum medical improvement, [sic] he was released from my care to return to gainful employment and I am not clear as to why that did not take place." *R. at 346.* On May 14, 1990 Dr. Stough stated that the MRI of the lumbar spine (on May 9, 1990) "shows the surgical defect in the lumbar spine and in addition, associated epidural scarring, but no evidence of disc herniation." *R. at 343.* Dr. Stough recommended that Plaintiff be referred to a pain clinic for physical and psychological evaluation and a structured program, and that Plaintiff be "release[d] as having reached maximum medical benefit." *R. at 343.*

Several doctors examined Plaintiff for the purpose of workers' compensation ratings. A finding of "disabled" by another agency is entitled to consideration, but the finding is not binding on the Secretary. See Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975). "[F]inal responsibility for determining the ultimate issue of disability is reserved to the Secretary." Castellano v. Secretary of Health & Human Services, 26 F.3d 1027, 1029 (10th Cir. 1994).

On September 14, 1989, James R. Williams, M.D., evaluated Plaintiff (workers' compensation) and concluded, based upon Plaintiff's impairment to his lumbosacral region, sciatic nerve, and range of motion, that Plaintiff had a disability rating of 34%. *R. at 375.*

On July 24, 1990, Kenneth C. Duncan, M.D., evaluated Plaintiff for workers' compensation and concluded that Plaintiff had an 85% impairment. Dr. Duncan interpreted Plaintiff's MRI (performed by Dr. Stough) as indicating arachnoiditis[9] and degenerative disc disease at L4-5. *R. at 390.* Dr. Duncan's impairment rating was based on Plaintiff's allegations of limitation of motion of lumbosacral spine (22%), pain from L5-S1 leading to impairment of lower left extremity (3%), disturbance of sexual function (10%),[10] depression[11] (20%), surgically treated disc syndrome

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[9] "Arachnoiditis" is defined in *Taber's Cyclopedic Medical Dictionary* 142 (17th ed. 1993), as "inflammation of the arachnoid membrane." Dr. Munneke interpreted Plaintiff's MRI as indicative of arachnoiditis. *R. at 414.* Dr. McGovern disputed the possibility of arachnoiditis. *R. at 419, 425-26.*

[10] Dr. Munneke noted that Plaintiff reported he "has difficulty with sexual activity." *R. at 413.* Plaintiff's record additionally contains some mention of "bladder" problems. *R. at 403 (mentioned in psychiatrist's report).*

[11] At the hearing on July 7, 1993, Plaintiff testified that his depression was no longer a problem. *R. at 76, 92.*

(10%), arachnoiditis with disturbance of gait (20%). *R. at 392.* Dr. Duncan noted that because of Plaintiff's inability to sit or stand at length, in addition to other factors, Plaintiff was a poor candidate for vocational training, and Plaintiff's impairment was 100%. *R. at 387-393.*

Plaintiff was evaluated by Shashi Husain, M.D., on February 11, 1990. Dr. Husain reported that Plaintiff was not cooperative. *R. at 400.* Dr. Husain concluded that Plaintiff appeared to be suffering from mental depression and should be evaluated by a psychiatrist. In addition, Dr. Husain noted that Plaintiff "should be enrolled in a comprehensive rehabilitation program including a work-hardening program so that he can be retrained to go back to doing whatever he can." *R. at 401.*

Ronald C. Passmore, M.D., evaluated Plaintiff on March 12, 1991. Dr. Passmore noted that Plaintiff was depressed because of his back problems, had few minimal stressors, and that he was capable of handling any funds that he might have. *R. at 402-05.* Dr. Passmore noted that Plaintiff was **able to sit comfortably**. *R. at 404.*

Plaintiff was examined by John A. Munneke, M.D. on December 19, 1990. *R. at 413.* Dr. Munneke noted that Plaintiff stated that "he tries to stay physically active . . . . he does a lot of walking, but has to use 2 canes to walk." *R. at 414.* Dr. Munneke concluded that based on Plaintiff's age, condition, education and work experience that he was permanently totally disabled from gainful employment. *R. at 415.* Dr. Munneke noted that Plaintiff has chronic pain, is 40 pounds overweight and has poor spinal musculature. *R. at 415.* Dr. Munneke determined that Plaintiff had

not had a chance to have intensive physical rehabilitation and suggested a program located in Dallas, Texas. "In my opinion, based upon his age, education, and work experience, he is a candidate to undergo that type of rehabilitation to see if he could be re-trained and reconditioned to return to gainful employment. However until such point . . . he, in my opinion, is permanently totally disabled." *R. at 415.*

Plaintiff had numerous RFC Assessments. A RFC Assessment on April 17, 1987 indicated Plaintiff could lift fifty pounds occasionally and twenty-fife pounds frequently, sit six hours (eight hour day) and stand six hours (eight hour day). *R. at 138.* A RFC Assessment on May 18, 1987 indicated Plaintiff could lift twenty pounds occasionally, ten pounds frequently, sit six hours (eight hour day) and stand six hours (eight hour day). *R. at 143.* RFC Assessments on January 12, 1989 and June 26, 1989 show Plaintiff able to lift fifty pounds frequently, twenty-five pounds occasionally, and sit or stand six hours (eight hour day). *R. at 271, 279.* RFC Assessments on February 22, 1991 and August 15, 1991 indicate that Plaintiff is able to lift twenty pounds frequently, ten pounds occasionally, sit six hours (eight hour day), and stand or walk six hours (eight hour day). *R. at 299, 323.* An evaluation by J.D. McGovern, M.D., on March 21, 1992,[12] indicates that Plaintiff can sit for thirty minutes to one hour at a time, stand for thirty minutes to one hour at a time, and walk for thirty minutes to one hour at a time. *R. at 424.* In an eight hour day, the doctor noted that Plaintiff could sit for two to four hours, stand for two to three hours, and walk for two to three hours. *R. at 424.*

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[12] Plaintiff's last day of insurance for disability purposes was March 3, 1991. *R. at 328.*

Plaintiff's medications list, submitted September 19, 1991 indicated that Plaintiff was taking Extra-Strength Tylenol (nine per day). *R. at 268.* Plaintiff's February 10, 1992 medications list indicated Plaintiff was taking no prescription drugs, but was taking Nuprin (for pain). *R. at 412.* At the time of his July 7, 1993 hearing, Plaintiff was taking Roxilox, Anaprox, and Cyclobenzaprine. *R. at 79.* (During Plaintiff's interview with Dr. Passmore, Plaintiff stated he was supposed to be taking an antidepressant, Flexeril, and Tylenol #3, but that he could not afford the medications.) *R. at 404.*

In this case, the ALJ found that Plaintiff has restrictions from his back pain and is unable to lift more than ten pounds, but is able to perform sedentary work if permitted to "change positions." The record does contain substantial evidence to support the finding of the Secretary that Plaintiff has the ability to sit for at least six hours each day if permitted to "change positions." At least one treating physician, in 1990, indicated Plaintiff could be returned to work.[13] In addition, at least six RFC Assessments (from 1987[14] - 1991) indicate Plaintiff is capable of lifting at least ten pounds and sitting at least six hours each per day.

Vocational Expert

Plaintiff additionally asserts that the ALJ determined Plaintiff had no transferable skills, that the vocational expert found no jobs (other than one with

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[13] Two treating physicians concluded, based on the same tests, that Plaintiff was "disabled" until his pain could be controlled. The findings of these physicians are conclusory. Beyond the ultimate conclusion of "disability," the physicians do not indicate specific exertional limitations on Plaintiff.

[14] Plaintiff was previously denied two prior disability applications. The ALJ notes that consideration of disability in this case "commences July 7, 1989." *R. at 17.*

transferable skills) available to Plaintiff, and consequently, nothing supports the ALJ's conclusion that a significant number of jobs were available in the national economy which Plaintiff could perform.

The ALJ presented the following hypothetical to the vocational expert.

> Let's assume that we have a male individual. He's 48-years-old. He has a high school education and the ability to read and write and use numbers. Let's assume that he has the physical capacity to preform [sic] sedentary work and I find also that he's afflicted with a symptomatology of chronic pain due to previous back surgery and that he must take medication daily for that pain and other problems. And that he must change position from time to time to relieve this symptomatology.

R. at 81. The hypothetical adequately presents to the vocational expert Plaintiff's limitations as determined by the ALJ. The vocational expert testified that several jobs were available, in significant numbers in both the local and national economies for such a person. *R. at 82.*

As indicated above, substantial evidence supports the ALJ's determination that Plaintiff could sit for the amount of time required to perform sedentary work. However, the wording of the hypothetical "change positions" does not clearly reflect a requirement that Plaintiff be permitted to alternate between sitting and standing. And, at least one RFC Assessment (March 21, 1992) indicates Plaintiff could sit for only thirty minutes to one hour at a time, which would require that Plaintiff be permitted to alternate between sitting and standing.[15]

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[15] At the February 11, 1992 hearing, Plaintiff's attorney indicated that Plaintiff "ha[d] no objection" to the March 19, 1992 assessment of Plaintiff. *R. at 83.*

Although the ALJ's hypothetical did not specifically include a sit or stand at will requirement, Plaintiff's attorney, in a modified hypothetical, asked the following (based on Plaintiff's March 1992 RFC Assessment).

> Now, let's assume that we have a claimant such as the claimant who's 48 years of age, who has a high school education, who had been found to be able to sit for 30 minutes to one hour at one time, who can sit for four hours out of an eight hour day, who's able to stand for 30 minutes to one hour and for three hours out of an eight hour day, who can walk for 30 minutes to one hour and three hours out of an eight hour day, who's able to lift five pounds frequently, ten pound occasionally, carry five pounds frequently and ten pounds occasionally, who can infrequently bend, squat, crawl, climb and reach.

R. at 83. The vocational expert determined that the only job that this hypothetical person would be able to do was that of a dispatcher clerk (1,046 in Oklahoma[16\] and 95,432 nationally). *R. at 82, 87.*

Plaintiff asserts that although the vocational expert testified that a person such as Plaintiff could perform this work, the vocational expert also testified that such a "hypothetical person" would only be able to do the job of a dispatcher clerk if the person had transferrable skills. Plaintiff argues that because the ALJ found that Plaintiff had no transferrable skills, the ALJ is prohibited from relying on the dispatcher clerk job as constituting substantial evidence to support a finding of non-disability.

[16\] Plaintiff does not address whether 1,000 jobs is a "significant" number. However, the court determines that, under the circumstances of this case, the number of jobs cited by the vocational expert was "significant." See Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (refusing to draw a bright line, but indicating the criteria for consideration in determining whether a significant number of jobs is present). See also Lee v. Sullivan, 988 F.2d 789, 793 (7th Cir. 1992) (summarizing the various positions of the circuits: Sixth Circuit found 1,350 positions significant; Ninth Circuit found 1,266 positions significant; Tenth Circuit found 850-1,000 potential jobs significant; Eighth Circuit found 500 jobs significant; Eleventh found 174 positions significant).

Plaintiff is correct; the vocational expert testified that the position of dispatcher clerk was available only to an individual who had transferrable skills. However, the vocational expert also testified that Plaintiff had such skills.

> Q: Let me get this straight. What are his skills that are transferable [to the job of dispatcher clerk]?
> A: He has the ability to understand blueprint specifications. He has the knowledge of hand tools, power tools and hoisting equipment. He also has the ability to understand locations, where to find them. He also has the ability to understand building materials and the specifications that go in them. And he, also, has the ability to know the time. He has weight limits and things of that nature.
> Q: Okay. Understanding locations, what's that mean?
> A: Well, it can mean two things. First of all, it could mean understanding where the site is [that] the erection is to take place. And then also, when you are constructing a building or any other facility you need to be -- especially with prefab material, you need to understand which part of the building different types of materials go on. You need to understand the location for windows and doors would b[e], as well as outlets and other things of that nature.
> Q: Okay. So, tell me how that goes into or transfers to doing dispatching work.
> A: Well, number one, you have got your job specifications, once a job order comes in. You have to be able to relay the information, what materials are needed, the number of materials [that] are needed. As well as, as be able to relay the blueprints for the type of activity that you are doing.
> Q: And how many -- and well, now, again, that's steel work. And you don't -- you can't tell us -
> A: These could translate to building also.

R. at 88-89.

In addition, as noted by Plaintiff, the ALJ states, in his findings, that "the claimant does not have any acquired work skills, which are transferable to the skilled or semiskilled work functions of other work." *R. at 25.* However, the only evidence in the record on Plaintiff's "transferable skills" is the testimony of the vocational

expert who stated that Plaintiff does have the transferable skills necessary to perform the work of a dispatcher clerk. The ALJ's finding to the contrary is erroneous and not supported by the record. The court finds that the testimony of the vocational expert supports a finding that Plaintiff had the necessary skills and RFC to perform the job of a dispatcher clerk.

Accordingly, the Secretary's decision is **AFFIRMED.**

Dated this 29 day of December 1995.

Sam A. Joyner
United States Magistrate Judge